116

No. 08-892

In The

Supreme Court of the United States

DAVID P. BRAUN,

Petitioner,

v.

DENALI BOROUGH,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Alaska

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Denali Borough and the State of Alaska have used their power to deprive residents of voting rights under the Equal Protection Clause of the Fourteenth Amendment and the Alaska Constitution.

PARTIES TO PROCEEDINGS

All parties do not appear in the caption on the cover page. There are three parties to proceedings in this Court:

1) David P. Braun
2) Denali Borough
3) The State of Alaska

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PETITION FOR A WRIT OF CERTIORARI

I, David P. Braun, respectfully petition for a writ of certiorari to review the decision of the Alaska Supreme Court.

OPINIONS AND ORDERS INVOLVED

Appendix A. Opinion of the Supreme Court of the State of Alaska, dated September 12, 2008. (App. 1)

Appendix B. Memorandum Decision of the Superior Court for the State of Alaska Fourth Judicial District at Fairbanks, dated April 14, 2005. (App. 39)

Appendix C. Memorandum Decision and Order of the Superior Court for the State of Alaska Fourth Judicial District, dated May 15, 2006. (App. 49)

Appendix D. Order Upon Conclusion of Appeal of the District/Superior Court for the State of Alaska Fourth Judicial District at Fairbanks, dated December 9, 2008. (App. 62)

Appendix E. Order On Remand: Attorney Fees, of the Superior Court for the State of Alaska Fourth Judicial District at Fairbanks, dated December 9, 2008. (App. 64)

Appendix F. Order Regarding Fees and Costs, dated September 12, 2008. (App. 66)

Appendix G. Order Allowing Supplemental Briefing, dated August 16, 2007. (App. 67)

Appendix H. Order of the Supreme Court of the State of Alaska by finding appellant's Motion to Consolidate Moot, dated October 20, 2006. (App. 69)

Appendix I. Order of the Supreme Court of the State of Alaska consolidating Mr. Braun's appeals, dated October 20, 2006. (App. 71)

Appendix J. Judgment of the Superior Court for the State of Alaska Fourth Judicial District at Fairbanks, dated July 12, 2006. (App. 74)

Appendix K. Order of Clarification of the Superior Court for the State of Alaska Fourth Judicial District, dated February 16, 2006. (App. 76)

Appendix L. Stipulated Agreement and Order to Stay Proceedings and Contingent Dismissal of the Superior Court for the State of Alaska Fourth Judicial District at Fairbanks, dated May 21, 2004. (App. 79)

Appendix M. Order of the Supreme Court of the State of Alaska denying rehearing, dated October 24, 2008. (App. 83)

JURISDICTION

The Alaska Supreme Court issued its opinion on September 12, 2008 (App. 1). The Motion for Rehearing was denied on October 24, 2008 (App. 83). The Order Upon Conclusion of Appeal was issued on December 9, 2008 (App. 62). The Order on Remand was issued on December 9, 2008 (App. 64). This Court has jurisdiction under Article III of the U.S.

Constitution, and jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES, CASES, AND REGULATIONS INVOLVED

Article III Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution . . .

Amendment XIV Section 1. . . . . . No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Alaska Constitution

Article IV. The Judiciary (a) the supreme court shall be the highest court of the state, with final appellate jurisdiction. It shall consist of three judges.

Article VI Section 11. Any qualified voter may apply to the superior court to compel the redistricting board, by Mandamus or other wise, to perform its duties under this article or to correct any error in redistricting.

Article X Section 1. Local Government Purpose and Construction The purpose of this article is to provide for maximum local self-government. . . . A liberal construction shall be given to the powers of local government units.

Section 3. Boroughs . . . Each borough shall embrace an area and population with common interests to the maximum degree possible . . .

Section 14. Local Government Agency An agency shall be established by law in the executive branch of the state government to advise and assist local governments. It shall review their activities, collect and publish local government information, and perform other duties prescribed by law.

Law

Voting Rights Act of 1965. Prohibited states from imposing any:

> voting qualification or prerequisite to voting, or standard, practice, or procedure . . . to deny or abridge the right of any citizen of the United States to vote on account of race or color. . . .

Civil Rights Attorney's Fees Award Act of 1976:

> The court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

Cases

***Buckhannon Board and Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598 (2001). Not reported.**

The Supreme Court drastically reduced the availability of attorneys' fees and litigation expenses by rejecting the "catalyst theory." Congress authorized the award of attorneys' fees to the "prevailing party" in a variety of laws, including the ADA, the Civil Rights Act of 1964, the Fair Housing Amendments Act of 1988, the Voting Rights Act Amendments of 1975, the Civil Rights Attorney's Fees Awards Act of 1976, and quite a few others.

***Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000).**

> "As we have repeatedly noted, in vote-dilution cases [section 5] prevents nothing but backsliding, and preclearance under [section 5] affirms nothing but the absence of backsliding. . . ."

***Reynolds v. Sims*, 377 U.S. 533, 577 (1964)** Not fully reported, quoted in part below.

> 1. The right of suffrage is denied by debasement or dilution of a citizen's vote in a state or federal election.
>
> 2. Under the Equal Protection Clause a claim of debasement of the right to vote through malapportionment presents a justiciable controversy; and the Equal Protection

Clause provides manageable standards for lower courts to determine the constitutionality of a state legislative apportionment scheme.

3. The Equal Protection Clause requires substantially equal legislative representation for all citizens in a State regardless of where they reside. Pp. 561-568.

(a) Legislators represent people, not areas.

(b) Weighting votes differently according to where citizens happen to reside is discriminatory.

. . .

When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.

***Kentopp v. Anchorage*, 652 P.2d 453 (Alaska 1982).**

Resident brought suit against municipality and members of municipal assembly requesting reapportionment of assembly districts and truncating terms of assembly members. The Superior Court Third Judicial District, Anchorage, Mark Rowland, Jr., granted summary judgment to municipality, and resident appealed. The Supreme Court, Compton, J., held that:

1) Municipal assembly failed to comply with its home rule charter by refusing to declare itself malapportioned when

presented with voter petition supported by reliable evidence of malapportionment;

2) The municipal assembly's decision not to truncate terms of all assembly members as part of reapportionment plan was proper;

3) Court ordered truncation was not compelled by assembly's improper failure to declare itself malapportioned; and

4) Superior court erred in considering sua sponte question of malapportionment under reapportionment plan.

Affirmed in part, reversed and vacated in part. . . . "Malapportionment" exists when maximum comparative variance exceeds ten percent."

***Kenai Peninsula Borough v. State of Alaska*, 743 P.2d 1352, 1371 (Alaska 1987) Nos. S-1207, S-1216. Oct. 2, 1987.**

Appeal was brought of legislative reapportionment plan. The Superior Court, Third Judicial District, Anchorage, Brian Shortell, J., dismissed complaint with prejudice following nonjury trial. Appeal was brought. The Supreme Court, Rabinowitz, C.J., held that: (1) realignment of house district for Southeastern Alaska did not violate Equal Protection Clause of State or United States Constitutions; (2) creation of house district combining portions of two cities satisfied State Constitution's contiguity,

compactness and socioeconomic integration requirements; (3) creation of senate district impermissibly discriminated against city voters under equal protection clause of State Constitution; and (4) declaration that reapportionment board's purpose in fashioning district was illegitimate was an adequate remedy for equal protection violation without requiring board to redraw district.

Affirmed in part and reversed in part.

Compton, J., concurred in part, dissented in part and filed opinion.

***Michael J. Walleri v. City of Fairbanks*, 964 P.2d 463 (Alaska 1998). No. S-8186. Oct. 2, 1998.**

Taxpayer brought suit against city, challenging the validity of the city's contract for the sale of municipal utilities to a third party. The Superior Court, Fourth Judicial District, Fairbanks, Niesje J. Steinkruger, J., dismissed and awarded attorney fees to city. Taxpayer appealed. The Supreme Court, Compton, J., held that: (1) none of the counts the complaint constituted an "election contest"; (2) none of the counts involved a nonjusticiable political question; and (3) provision city charter which allowed the city council to discuss certain matters in a closed or executive session was preempted by state open meetings statutes.

Affirmed in part, reversed in part, vacated in part, and remanded.

Alaska Statutes

AS 22.05.020. Composition and general powers of supreme court. (a) The supreme court is a court of record and consists of five justices including the chief justice.

Title 29 Municipal Government Sections 29.20.060-29.20.100 statutes available online at: http://www.commerce.state.ak.us/dca/pub/Title29_2008.pdf

Section 29.20.050. Legislative power. (a) The legislative power of a borough is vested in the assembly.

Section 29.20.060. Assembly composition and apportionment . . . . (c) An assembly may not provide for weighted voting.

Section 29.020.080. Assembly recomposition and reapportionment . . . (c) if a petition signed by not less than 50 voters requests the assembly to determine whether the existing apportionment meets the standards for apportionment in AS 29.20.060, and the petition contains evidence that the existing apportionment does not meet those standards, the assembly may make the determination requested. The assembly shall make a determination required by this subsection within two months of receipt of a petition that meets the requirements of this subsection.

(d) An ordinance adopted by the assembly under (b) or (c) of this section shall be submitted to the voters for approval. In order for the ordinance to be approved it must receive the approval of a majority of the votes cast.

Section 29.20.100. Judicial review and relief.

(b) Each of the following is subject to judicial review:

(1) a plan of reapportionment approved by the voters under AS 29.20.080(a);

(2) a determination by the assembly under AS 29.20.080 that the standards of AS 29.20.060 do not require a change in apportionment;

(3) a reapportionment ordinance approved by the voters under AS 29.20.080(d);

(4) a reapportionment order of the commissioner made under AS 29.20.090(c);

(5) a reapportionment ordinance approved by the voters under AS 29.20.090(d); and

(6) a reapportionment order of the commissioner made under AS 29.20.090(e). (§ 7 ch. 74 SLA 1985)

Alaska Rules of Appellate procedure.

Rule 1. Scope of Rules – Construction.

The procedure in the superior court and, so far as applicable, in the district court shall be governed by these rules in all actions or proceedings of a civil nature – legal, equitable, or otherwise. These rules shall be construed to secure the just, speedy and inexpensive determination of every action and proceeding.

Rule 202. Judgments From Which Appeal May Be Taken.

(a) An appeal may be taken to the supreme court from a final judgment entered by the superior court, in the circumstances specified in AS 22.05.010.

The Alaska Supreme Court, Jurisdiction Statement reads:

The supreme court has final state appellate jurisdiction in civil and criminal matters:

> 1. CIVIL APPEALS: The supreme court must accept appeals from final decisions by the superior court in civil cases (including cases which originated in administrative agencies).

Rule 503. Motions.

(g) Motions Determined by Full Court. A motion that would have the effect of determining the merits of a proceeding, or a motion referred to the full court by a justice or judge, shall be considered by the full court.

(h) Motions for Reconsideration.

(B) a motion for reconsideration of an order entered by an individual justice or judge under subparagraph (f) shall be determined by the full court.

STATEMENT OF THE CASE

This petition concerns two (of four) cases, challenging the constitutionality of reapportionments of Denali Borough Alaska (App. 2). Proceedings before the Alaska Supreme Court include two rounds of briefings and oral arguments (below) culminating in the consolidated decision in the Opinion (App. 1).

First complaint: On August 28, 2002 I filed 4FA-02-2156CI pro se, challenging the constitutionality of the 2002 apportionment, naming the Borough, the State of Alaska Department of Community and Economic Development and the Ombudsman as defendants (App. 53). The complaint alleged, with footnotes 1-5:

> 1) The Denali Borough assembly did not make "an honest and good faith effort"[1] to construct districts with equal proportional representation, and violated the civil rights of the citizens of Denali Borough by providing an assembly and school board composition and apportionment inconsistent with the equal representation standards of the Constitution of the United States. The assembly provided for weighted voting as prohibited in AS 29.20.060 (Assembly composition and apportionment). [AS 29.20.060](c).

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[1] *Reynolds v. Sims*, 377 U.S. at 577, but see *Brown v. Thornson*, 462 U.S. 835, 842 (1983).

2) The Denali Borough established districts that are not socially and economically integrated. The assembly established a multi-member three seat district for the purpose of diluting the power of voters whose numbers clearly warrant a separate assembly seat. The unnecessary creation of an outlandishly large three-seat district makes a sizable portion of the population subservient to the whims of others. This district divided a population that has a traditional cohesiveness, lives in the same general area, and has a lot of commonalities.

3) The State of Alaska, Department of Community and Economic Development (DCED), did not make an honest and good faith effort to enforce AS 29.20.060-29.20.120 (Assembly composition and apportionment). The above, points 1 and 2, were done with the knowledge, advice and assistance of the State of Alaska, Department of Community and Economic Development.

4) The Department of Community and Economic Development did not abide by the mandate in the Alaska Constitution, Article X, Section 14.

5) The State of Alaska, DCED, evaded its responsibility to enforce compliance with AS 29.20.060 in the Denali Borough by misrepresenting the role of the Federal Department of Justice (DOJ) in the reapportionment process. . . . Preclearance by the Department of Justice is warranted under

Section 5, the Voting Rights Act of 1965. The standard of review is that the " . . . proposed redistricting plan must not have the purpose or effect of worsening the position of minority voters." Compliance with the constitutional right to equal representation is not implied.[2]

6) The State of Alaska, Ombudsman, in its investigation of the above complaint against the State of Alaska, Department of Community and Economic Development, was not impartial (AS 24.55.030). The Ombudsman did not make a fair and reasonable attempt to determine whether those complaints are justified based on the written standards for investigation specified in AS 24.55.150. . . .

7) The DCED erroneously maintained that the Alaska Constitution, Article X, Section 1 limits them to a passive role in the reapportionment process, and that "maximum local self government" limits the state's role to advising on whether plans put forth by the Denali Borough would be precleared by the U.S. Department of Justice. Specifically, the DCED refused to suggest plans that provide for equal and fair proportional representation even though they knew of such plans.

8) The DCED allowed the Denali Borough to delay a vote on the reapportionment plan beyond the date specified in AS 29.20.070(b).

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[2] *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000).

> The Commissioner acknowledged that a final state redistricting plan was adopted on June 12, 2001.[3]
>
> . . .
>
> 10) The commissioner erroneously stated that variance over the 10% limit is justified by the Denali Borough's relatively small population and large land area.[4]
>
> . . .
>
> 12) The Ombudsman acknowledged the validity of the plaintiff's claims that equal representation standards had been violated without justification.[5] (R. 1-5)

The Borough was represented by Hughes, Thorsness, Powell, Huddleson, & Bauman LLC, James Gorski, attorney. Initial discovery included App. 85-112.

I hired Fairbanks Attorney Michael Walleri to represent me in 4FA-02-02156CI (App. 5).

Second complaint: In November 2003, I filed 4FA-03-2607CI, another pro se suit challenging the 2003 election (App. 5).

On April 6, 2004, to assure statutory authority to challenge any subsequent apportionment under

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[3] Department of Community and Economic Development letter of January 10, 2002.

[4] DCED letter of May 9, 2002.

[5] Ombudsman letter of August 6, 2002.

AS 29.20.100(b)(3), more than fifty registered voters of Denali Borough filed a second petition pursuant to AS 29.20.080(c) and (d). It stated:

> 1) the variance of the existing plan exceeds the Maximum of 10% without justification,
>
> 2) the Denali Borough provided inaccurate information to voters. The description of the apportionment is inconsistent with the census blocks assigned to the districts. The variance appears to be higher than the 11.9% reported.
>
> 3) the existing plan does not provide "fair and effective representation." There is evidence that District lines were drawn for the specific purpose of preserving three seats for the Anderson Clear District and diluting the Voting power of Healy Ferry, and the areas south of Anderson. The City of Anderson and the census blocks touching it would, standing alone, qualify for only two seats (R. Exc. 170).

Acting entirely pro se, I obtained a settlement conference on May 7, 2004 facilitated by assigned Chief Judge of the Fairbanks Superior Court Mark Wood (App. 5), involving: 1) Michael Walleri, my attorney in 4FA-02-02156CI, 2) me, pro se in 4FA-03-02607CI, and 3) Denali Borough attorney James Gorski. Judge Wood required verbal agreement from all three signatories to the agreement. The log notes state:

> 04:35:55 Court – We have been discussing this case since 8:30 this morning. . . .

04:36:19 The following is where we are in terms of agreement and disagreement.

04:36:30 First, Borough members agree to recommend that Denali Borough will review current apportionment plan, w/goal of bringing to standards of less than 10%.

04:36:56 Dismiss 03-2607 today, both parties bear costs and fees.

04:37:07 Third, Agree to recommend Denali Borough Assembly that if the assembly puts forth a new plan for apportionment that meets constitutional muster, then an alternative plan should also be put on ballot for voter consideration.

04:37:18 Four, if new apportionment plan is approved by the voters that meets constitutional muster, Denali borough agrees to review the school district boundaries and apportionment w/public and school district input and that any proposed changes will be put to voters at next scheduled election.

04:37:40 Five, any new apportionment plan approved by the voters be subject to Dept of Justice review.

04:38:52 Appeal before Judge Olsen, 02-2156, be stayed pending voter decision of assembly apportionment issue.

04:38:02 Seven, proposals to bring apportionment w/in guidelines, put to voters.

04:38:15 Eight, upon approval by the voters of a constitutionally acceptable apportionment

> plan, the appeal will be dismissed, parties will litigate costs and atty fees
>
> Gorski – it is agreement as I understand it.
>
> 04:38:39 Walleri – It is agreement as we understand it.
>
> 04:38:51 Braun – That is what we agreed on.
>
> 04:38:57 Court: Mr. Gorski to prepare dismissal of 03-2607. (R. Exc. 691,692).

Borough Attorney Gorski drafted a Stipulated Agreement and Order to Stay Proceedings and Contingent Dismissal. I refused to sign it, and the space for entry of my signature was eliminated. Two copies of the Stipulated Agreement and Order appear in Excerpts of Record (R. Exc. 286-289,609-612); neither bears my signature, or Judge Olsen's (App. 79-82).

On May 12, 2004 the borough assembly passed the resolution at App. 113 in response to the April 6, 2004 petition (above).

Third Complaint: In October 2004 I filed 4FA-04-2428CI, a pre-election challenge to the constitutionality of the plan approved by the assembly (App. 39, App. 5).

On November 2, 2004 voters approved the Denali Borough Assembly's reapportionment plan. It claimed a variance of 9% (App. 6). The *notarized* November 5, 2004 Certificate of Election is App. 115.

Fourth complaint: On November 10, 2004 I filed 4FA-04-2616CI, pro se, challenging the constitutionality of the reapportionment (App. 41). The *Complaint and Pleading* (R. Exc. 1-55) stated: "Plaintiff is contesting the adoption of the plan of apportionment approved by the voters under AS 29.20.080" (R. Exc. 1).

On March 31, 2005 Judge Pengilly heard Oral Argument on Cross Motions For Summary Judgment in 4FA-04-02616CI (R. Tr. Volume I).

On April 14, 2005 Judge Pengilly issued his *Memorandum Decision* (App. 39).

S-12050 Filed: On August 19, 2005 Walleri appealed Judge Pengilly's Memorandum Decision and Judgment, the Point of Appeal being: "Did the trial court err in holding that all plaintiff's claims were an election contest." Walleri then stopped representing me (App. 9).

On February 16, 2006 Judge Olsen signed his Order of Clarification (App. 76).

On March 21, 2006 I filed a *Brief of Appellant* in S-12050. That same day my 320 page *Excerpt of Record* was filed in S-12050.

Oral Argument in 4FA-02-02156CI occurred on May 5, 2006 (R. Tr. Volume II).

On May 15, 2006 Judge Olsen issued his *Memorandum Decision and Order* (App. 49).

S-12359 filed: On June 28, 2006 I appealed Judge Olsen's decision. The Points of Appeal in S-12359 are: "1) Did the trial court err in holding that the challenge to the 2002 apportionment scheme has not been successful, and 2) Did the trial court err in not awarding the Appellant/Plaintiff costs and attorney's fees regarding the merit review of the 2002 apportionment."

On July 12, 2006 Judge Olsen issued JUDGMENT (App. 74).

Oral Argument in S-12050 was heard on September 22, 2006. Justices Eastaugh, Bryner, and Mathews were present in person. Chief Justice Fabe was absent and participating by telephone. Justice Carpeneti was wholly absent. Please hear it online at http://www.ktoo.org/gavel/audio.cfm (at Audio Files type in date, click New Date, click Braun V. Denali Borough, S-12050).

On October 11, 2006 I filed a *Motion and Memo to Consolidate Cases Contesting Constitutionality of Voting Districts In Denali Borough* (R. below, next).

On October 20, 2006 the court, "at the direction of an individual justice" ordered my motion "**Moot.**" (App. 69). On that same day the court "**ORDERED** that the above captioned appeal is consolidated for decision with Braun's separate appeal in S-12359 for purposes of disposition" (App. 71).

On July 24, 2007 I moved "that the record in S-12359 be supplemented by addition of the P.L. 94-171

County Block Maps (Census 2000) for Denali Borough" (available online at: http://www2.census.gov/plmap/pl_blk/st02_Alaska/c02068_Denali/).

On August 16, 2007 the appellate court issued *Order to Allow Supplemental Briefing* (App. 67).

On January 30, 2008 I filed a *Notice of Ex Parte Proceedings and Other Violations of the Rules of Appellate Procedure Prejudicial to Appellant* alleging violations of Rules 102(c) and (f), 503(h)(B) and 74(e) accompanied by an *Affidavit of Appellant Supporting Notice of Ex Parte Proceedings and Other Violations of Rules of Procedure Prejudicial to Appellant* dated January 29, 2008 (App. 116).

The Clerk of the appellate court Marilyn Mayhand carried the P.L. County Block maps to Fairbanks prior to Oral Argument (App. 123).

On February 13, 2008 Oral Argument was held in S-12359. Please listen to the entire Oral Argument at http://www.ktoo.org/gavel/audio.cfm (at Audio Files type in dates, click New Date, click Braun V. Denali Borough, S-12359).

On September 12, 2008 the Court issued OPINION No. 6305 – September 12, 2008 (App. 1) and on the same day issued "at the direction of an individual justice" its *Order Regarding Fees and Costs* (App. 66).

On September 17, 2008 I filed a Motion for Rehearing Pursuant to Rule 506(a)(1)(2), and (3) (App. 83).

On September 18, 2008 I filed *Motion for Full Court Reconsideration of Order Regarding Fees and Costs Pursuant to AR 503* (App. 83).

On October 24, 2008 the court denied the petition for rehearing and simultaneously denied my September 18, 2008 motion for reconsideration (App. 83).

On November 25, 2008 the court issued an "Order" and a check (App. 125) granting me some of my expenses in the Alaska Supreme Court.

On December 6, 2008 Deputy Clerk Lori Wade confirmed that the appellate court had possession of the P.L. 94-171 County Block Maps (Census 2000) for Denali Borough, and that they had been taken to Fairbanks (App. 123).

On December 9, 2008 Judge Olsen issued both his Order upon Conclusion of Appeal (App. 62) and his Order On Remand: Attorney Fees (App. 64).

On December 24, 2008 I entered a *Motion and Memo for 1) Reconsideration of Order on Remand of December 9, 2008 and 2) Stay of Proceedings.* I moved that Judge Olsen "reconsider the Order of December 9, 2008 and stay further proceedings pending proceedings in federal court," stating:

> There has been no motion by either party for further proceedings in this court . . . The U.S. Supreme Court, in *Buckhannon* rejected the catalyst theory in the awarding of attorney fees. . . . Congress has authorized the award of attorney's fees to the "prevailing

party" in some laws, including the Civil Rights Act of 1964, the Voting Rights Act Amendments of 1975, the Civil Rights Attorney's Fees Awards Act of 1976. I am seeking all my fees and costs in these cases in a federal court.

I am not arguing for award of attorney fees and costs under "The Catalyst Theory." To be entitled to such fees, a party must be "the prevailing party" in the lawsuit or administrative proceeding. The appellate court's Opinion obliquely refers to that fact when it states on page 6, that "the borough opposed the motion, contending that Braun was not the prevailing party, that he was not a public interest litigant, and that the fees and costs he sought were inappropriate." By awarding me attorney fees and costs in this court the appellate court has indicated that I am the prevailing party, but refused to grant me fees and costs for what it admits was my successful challenge to this court's decision. The outdated and rejected Catalyst Theory itself would not apply. It requires the plaintiff establish that the suit caused the defendant to provide "substantial" or "significant" relief. 4FA-02-2156CI and its resolution by settlement "except to argue attorney fees" was not a catalyst for significant change in the apportionment of the Borough. The Borough assembly did not act in good faith, and put essentially the same apportionment before the voters.

This court should Reconsider the Order and Stay further proceedings pending the federal courts acceptance or rejection of my petition.

On December 30, 2008 the Borough filed a *Motion to Opposition for Stay of Proceedings* (App. 128).

REASONS FOR GRANTING THE PETITION

This is a civil rights case. The U.S. Supreme Court should exercise its supervisory power under Article III because the State of Alaska has indiscriminately used its power as an instrument for circumventing residents' rights to equally weighted voting.

The OPINION conflicts with this Court's decisions in *Reynolds v. Sims* and *Buckhannon v. Dep't of Health*, and the Alaska Supreme Court's decisions in *Kentopp, Kenai,* and *Walleri.* (*See* cases section at pages 5-8, *infra.*)

The above Statement of Cases and documents in the Appendix show that for six and one half years the Alaska Court System violated, and sanctioned violations of Rule 1 of the Rules of Procedure. The Rules of Civil Procedure were violated and manipulated so as to harass me with unnecessary delay and needless expense, exploit my lack of legal training, and force me to quit. I persevered. The State of Alaska is gambling that this pro se petition will not be prepared, accepted, or granted.

ARGUMENT

I

THE DENALI BOROUGH AND THE STATE OF ALASKA HAVE USED THEIR POWER TO DEPRIVE RESIDENTS OF VOTING RIGHTS UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT AND THE ALASKA CONSTITUTION.

A) The equal protection standards established by *Reynolds v. Sims* apply to all legislative districts in Alaska

The one person, one vote standard applies to all electoral districts *within* a state. Even local school boards are covered by equal protection standards (*Reno v. Bossier Parish School Board*). "The Equal Protection Clause requires substantially equal legislative representation for all citizens in a State regardless of where they reside" (*Reynolds*, at 3).

The Alaska Supreme Court, in the person of Chief Justice Fabe, takes the inherently ridiculous position that, while individuals are entitled to equal protection, and equal protection applies to state legislative districts, prohibitions against numerically weighted voting and gerrymandering do not apply to local voting districts. (App. 23, 24). The OPINION disingenuously states:

> Though he does not cite it, the third factor Braun lists, which concerns integrated socio-economic areas, refers to language from Article VI section 6 of the Alaska constitution.

> But article VI governs legislative apportionment.

However, Sec. 29.20.050. Legislative power. states "(a) The legislative power of a borough is vested in the assembly."

The appellate court's position that my "language" does not apply to borough districting essentially rules out any challenge to assembly reapportionments.

B) The 2002 and 2004 reapportionments of the Denali Borough Assembly violate the Equal Protection Clause of the Fourteenth Amendment

The OPINION conflicts with *Reynolds* and Alaska's *Kentopp* and *Kenai* decisions. All three require assemblies make a good faith effort to achieve precise mathematical equality when *reapportioning.* A legislative body does not have to reapportion whenever population changes. In Alaska malapportionment exists when maximum comparative variance exceeds ten percent.

Even after four lawsuits the court still maintains that any *reapportionment* under 10% is presumptively constitutional. A ten percent variance is not "the ideal" (App. 87). The OPINION disingenuously holds:

> "that an *apportionment* plan with a variance under 10% falls in a category of minor deviations and meets the quantitative standard of one person one vote. It is undisputed that the

> variance of the 2004 *reapportionment* plan is under 10%. The 2004 reapportionment plan therefore meets the first element of the Kenai test." (*Emphasis added*) (App. 21).

In reality, the 2002 *reapportionment* was patently unconstitutional simply by providing for unjustified weighted voting *over* 10%. *Kentopp* established that when *reapportioning*, assemblies must strive for precise mathematical precision (i.e. one person one vote) as established in *Reynolds v. Sims*. Variations in excess of ten percent are unconstitutional unless the government body justifies the malapportionment.

Reynolds also prohibits gerrymandering: Documents in the Appendix clearly show that the appellate court chose to ignore and conceal evidence that the borough assembly did not strive for mathematical equality or fair and equal representation in 2002, and gerrymandered again in 2004. The OPINION says the 2004 plan:

> reapportioned its four districts to coincide with the 2000 U.S. Census Block Boundaries. The 2004 Borough proposal achieved a variance of 9%. The citizen generated plan, which was developed by Braun, featured five districts, also following census block boundaries, and at-large voting. Its variance was 8.7%. (App. 6)

In reality, the *citizen* generated plan provided at-large "by-district" representation districting, not *wholly* "at-large" (App. 6). It made "honest and accurate elections possible. Assembly members must

reside in their district but would be voted on by everyone in the borough . . . It would only be necessary to determine in which district candidates live" (R. Exc. 177-179, 212). The *citizen* generated plan would have given one third of the residents of the north district living outside Anderson their own seat. This configuration would have put all of Healy into two districts separate from both Anderson and McKinley Park. No one district would have a majority of seats on the assembly (R. Exc. 180). It is possible to form five districts with lower deviation from one person one vote than the approved assembly plan with only four districts. Clearly any justification for the 2004 configuration based on a lack of alternatives is invalid.

The OPINION makes the declaratory statement that "a. The 2004 Denali Borough reapportionment plan does not violate the federal Equal Protection Clause." Chief Justice Dana Fabe then declares: "Braun has not met his burden of proving that Denali Borough voters are being "consistently and substantially excluded from the political process." In reality, App. 79-82, App. 85-115 and an examination of the record in these cases shows that I have repeatedly, over six and one half years, presented *both* "evidence of continued frustration of the will of a majority of the voters" *and* "effective denial to a minority of voters of a fair chance to influence the political process." (App. 21)

This is simple arithmetic. The 2002 and 2004 apportionments arbitrarily and capriciously denied a minority of voters their own seat on the assembly and

fair chance to influence the political process. The borough admits that the North District is an at-large three member district where 60% of residents reside in the City of Anderson and 40% live outside the City of Anderson, and that the three member North District can be divided into a two member district and a one member district with less deviation from one person-one vote than the voter approved 2002 or 2004 plans. (App. 6, 115, R. Exc. 12, paragraphs 58, 60, 61 and answers pp. 60, 61 and Exc. 177-180, 183).

The majority of borough residents have also been denied control of a majority of assembly seats, though it is *not* necessary that "Healy area voters be grouped in one district" (App. 23, 26) to have proportional representation. Two thirds of borough residents have also been denied control of two thirds of assembly seats, which allows the four representatives elected by residents of Cantwell and Anderson to illegally block any attempt to override a veto by the Mayor. The 2000 census "number[ed] 1,893" residents of the Borough in *five* voting districts, their names and populations described as:

Anderson Voting District, 260,

Cantwell Voting District 239,

Clear Voting District 316,

Healy Voting District 907,

Denali Park Voting District 171 (R. Exc. 139-145).

The borough simultaneously described *three* voting districts, arranged from south to north on the George Parks Highway, as:

> District 1, Cantwell/Kantishna, Mile 202.0-222.4 Parks Highway, Mile 113.0-135.5 Denali Highway.
>
> District 2, Denali/ Healy, Mile 222.5-260.6 Parks Highway.
>
> District 3, Clear/Anderson, Mile 260.7-288.3 Parks Highway (R. Exc. 196).

In May 2001 the Alaska Department of Labor published the *Selected 2000 Census and 1990 Census Data,* quoted below:

> 2000 Census Redistricting Data
>
Geography	Population
Denali Borough	1893
Anderson City	367
Cantwell CDP	222
Ferry CDP	29
Healy CDP	1000
McKinley Park CDP	142
(Remainder of Borough)	133 (R. Exc. 128).

In 2000 the Anderson Voting District numbered 260 and was a small area of Anderson city which numbered 367 residents. The Cantwell CDP numbered 222 residents but the Cantwell Voting District numbered 239 residents and included residents of the McKinley Park CDP. There was no incorporated or

unincorporated place named Clear in 2000 Federal census, but a Clear Voting District numbered 316 residents and included most of the acreage of the city of Anderson, unassigned residents, and residents of the Healy CDP. The Denali Park Voting District numbered 171 residents but the McKinley Park CDP numbered 142. The census counted 1000 residents of the Healy CDP, but the Healy Voting District had only 907 residents. (R. Exc. 139-145, 226, R. 836-838 [P.L. 94-171 County Block Maps 004,011,018], Pl-94-171 County Block Maps (Census 2000) for the Borough are online at: http://www2.census.gov/plmap/pl_blk/st02_Alaska/c02068_Denali/).

The Denali Borough Assembly declared itself "malapportioned" on August 12, 2001 (App. 3). Minutes of that meeting state:

> Gorski [Borough Attorney] said that over the last few months they have focused on the reapportionment issue. He said that he has previously provided a letter of his recommendation, and the assembly must make a determination today if they are apportioned correctly. He said the assembly has a 60 day window that runs out next week. The statutes say that home rule boroughs are exempt from some sections of Title 29 if the borough charter addresses the issue, but he feels the Denali Borough Charter is a little on the thin side regarding this issue.

At that same meeting Assembly member Jere Pollock introduced a redistricting ordinance that provided for

six assembly members to be elected from District 2 stating: "This ordinance will make it so people can vote in the same district that their kids go to school in and in their fire district." District 3 Representative Sid Michaels said:

> In the move to allow 6 members from, be elected basically from the Healy core area or district 2, you are providing a majority does not only rule the assembly or *could* rule the assembly, but could actually override a veto of the mayor. (R. Appellant's Brief, (non-conforming) in S-12359, Exhibit 2F, 2K [an audio cassette]).

In fact, mathematical equality *can* be achieved by creating three districts: 1) a two member north district containing 420 persons residing in Anderson and unassigned areas, 2) a single member south district containing 210 of the 222 residents of the Cantwell CDP, and 3) a six member middle district containing all other residents of the borough (R. Exc. 180, 183, 212, 213, 215, P.L. 94-171 County Block Maps). This six member Middle district – the "Healy Core Area" described above – contains residents with the most common interests, while Anderson and the Cantwell CDP have the least "common interests" (Article X, sec. 3) with the rest of the borough. Cantwell is socially, economically, and geographically separate from the rest of the borough; it is the only borough community located south of the Alaska Range, and, with a 20.92% American Indian and Alaska Native population (R. Exc. 140), has "the largest concentration of

Alaska Natives in the Borough. (App. 50, R. Exc. 140, 266). The City of Anderson is primarily a military base. (App. 50, R. Exc. 185, 186, [ftp://ftp.dcbd.dced.state.ak.us/DCBD/Municipal%20Certificates/Cities/Anderson.pdf], R. 836 [PL-94-171 County Block Maps (Census 2000), map 004] at: http://www2.census.gov/plmap/pl_blk/st02_Alaska/c02068_Denali/).

In December 2003 Alaska's Division of Elections listed these *eleven* "Precincts within the Denali Borough assembly districts":

Denali North
08-100 Anderson
08-120 Clear
08-136 Healy (Ferry area voters and voters at MP 252.6-261.5 Parks Hwy)

Denali South
08-110 Cantwell
08-125 Denali Park (Kantishna voters)

Denali East
08-125 Denali Park
08-136 Healy (voters east of river and MP 242.3-242.9 Parks Hwy)

Denali West
08-125 Denali Park (voters between MP 231.5-237 Parks Hwy)

Precincts In the Denali Borough North Assembly area but in the West Central School Board area:
08-120 Clear (voters between MP 261.6 and 268.9 Parks Hwy)
08-136 Healy (Ferry Area Voters and voters at MP 252.6-261.5 Parks Hwy) (R. Exc. 224, 228)

The OPINION conveniently ignores the existence of the McKinley Park CPD, Ferry, and the 133 unassigned residents. It notes that Healy residents number a majority 1000 of the 1893 residents of the borough, but that the West Central District has only 850 residents and four seats. The combined residents of Anderson and Cantwell number 589 – less than one third of borough residents. The north district, dominated by Anderson City with 367 of 609 residents controls three seats (App. 107), and with Cantwell (the 222 residents of the South district) in tow can illegally frustrate the will of *two thirds* of borough residents because they control four of nine seats (App. 16-17). Moreover, the majority of residents residing in Healy, Ferry, and unassigned areas (1162 people) have been denied control of a majority of seats on the Assembly – a patently undemocratic *reapportionment.*

Kenai reiterated the federal requirement for "fair and effective representation" (*Reynolds v. Sims*) as follows: "The constitutional interest allegedly impaired here is not the right to vote per se, but the interest of individual members of a geographic group or community in having their votes protected from

disproportionate dilution by the votes of another geographic group or community." Evidence obtained in discovery was ignored, suppressed, and discounted (App. 79-115).

C) The Alaska Supreme Court violated Appellate Rule 202(a) by not taking Jurisdiction over final decisions by the superior courts in these two civil cases; I proved the points of appeal.

The Opinion falsely declares: "Review of an administrative decision calls for deference to the administrative agency when the issue is a question of law requiring agency expertise or a question of fact." (App. 12). In reality, Rule 202 requires the state supreme court accept appeals from final decisions by the superior court in civil cases (including cases which originated in administrative agencies). More importantly, Article III of the U.S. Constitution and Article 4 of the Alaska Constitution require judicial review of administrative and legislative actions on constitutional grounds.

The Opinion does not quote the point of appeal in S-12050: "Did the trial court err in holding that *all* plaintiff's claims were an election contest?" (*Emphasis added*) (R. Appellant's Points of Appeal, August 19, 2005 filed by Michael Walleri, AK Bar # 7906060). The Opinion itself notes that my complaint *nowhere* met the criteria for an election contest. Chief Justice Fabe noted that Judge Pengilly "concluded Braun IV was

an election challenge on independent grounds," but did not say what those grounds were (App. 28). In *Walleri* Superior Court Fourth Judicial District Fairbanks Neisji Steinkruger dismissed and awarded attorney fees and costs to city. The Supreme Court ruled:

> A city's contract for the sale of municipal utilities to a third party had independent significance apart from an election in which voters approved the sale, and thus, none of the counts of a taxpayer's complaint, which sought to void or reform the contract, constituted an "election contest." Nowhere did the taxpayer challenge the validity of the election result approving the sale, and thus, his complaint did not implicate the public policy favoring the stability and finality of such results.

I have been held to a higher standard than Superior Court Judge Steinkrugger, who was *allowed* to have *erred* in calling Walleri's complaint in *Walleri v. Fairbanks* an election contest.

The appellate court side-stepped ruling on Point C of Judge Pengilly's decision: "Braun may not argue the constitutionality of the apportionment plan in this case" (App. 46). Point C is itself an admission that the complaint addressed a constitutional issue independent of any election contest. The Alaska court system has chosen to ignore the fact that on May 12, 2004 the Borough assembly answered a statutory petition with Resolution 04-06 (App. 113). The petition

and resolution granted statutory authority for judicial review of the adopted 2004 apportionment in the Pengilly court pursuant to AS 29.20.100(b)(3). http://www.commerce.state.ak.us/dca/pub/Title29_2008.pdf.

The points of appeal in S-12359 were "1) Did the trial court err in holding that the challenge to the 2002 apportionment scheme has not been successful, and 2) Did the trial court err in not awarding the Appellant/Plaintiff costs and attorney's fees regarding the merit review of the 2002 apportionment." (App. 1). The original complaint and the *Amended Complaint* alleged *both* numerically weighted voting and vote dilution, *either* of which proves unconstitutionality. Judge Olsen admitted that variances over 10% were easily eliminated in 2004 but side-stepped declaring the 2002 *reapportionment* unconstitutional, stating only: "the challenge to the 2002 apportionment has not been successful." (App. 60). The entire Alaska court system chose to ignore the fact that both *Reynolds* and Alaska's *Kentopp* decisions declared that an assembly *reapportionment* ordinance with an unjustified variance over 10% is patently unconstitutional if the assembly does not justify the variance.

The appellate court likewise acknowledged that the 2002 *reapportionment* provided for unjustified variance greater than 10% but side-stepped a declaration on the constitutionality of the 2002 plan. The appellate court disingenuously upheld the flawed and fraudulent Settlement agreement stating that:

> Braun's argument that the settlement agreement created a process contrary to law because it "allowed the Denali borough to delay 'fair and effective representation' ... in Denali Borough by repeatedly putting forth illegal apportionment plans" must fail as we have already concluded that the 2004 reapportionment plan is constitutional. (App. 33).

In reality, I escaped the circular process in the Superior Court only by proceeding pro se in the appellate court following the withdrawal of Michael Walleri (App. 9).

D) The Alaska Supreme court erred in ruling that I am entitled, under the catalyst theory, to request appropriate attorney fees and costs once S-12359 has been remanded to the superior court

The appellate court duplicated the circular process in the lower court by reopening proceedings in the Superior Court (App. 62, 64, 128) "for consideration of the appropriate award" (App. 37). Saying I "will be entitled to request fees under the catalyst theory once the case has been remanded to the superior court" (App. 83) is a bribe and a trap. That allows the borough to argue 1) that the U.S. Supreme Court, in *Buckhannon,* rejected the "Catalyst Theory" in the awarding of attorney's fees and litigation costs, and 2) that I have not prevailed in any significant issue, or, alternatively, that I am only entitled to those fees related to numerically weighted voting over 10%. This turns the calendar back to August 2002, where

the questions of numerically weighted voting and vote dilution and enhancement were first raised.

The U.S. Supreme Court is allowed to award me reasonable attorney's fees pursuant to the Civil Rights Attorney's Fees Award Act of 1976. The appellate court denied the fruits of my labor in their court by denying me attorney fees and all costs. I did *not* bear all my costs in the supreme court as ordered by the court on September 12, 2008. (App. 66).

E) The State of Alaska has misrepresented Department of Justice preclearance under the Voting Rights Act of 1965 as federal clearance for weighted voting, and falsely claimed that Alaska's constitutional provision for "maximum local self government" precludes oversight of local reapportionments.

The appendix documents and the record of proceedings in the Alaska court system show a concerted effort to conceal gross incompetence and fraud in redistricting. On January 10, 2002 the Commissioner of DCED, the agency charged under Article X, Section 14 with enforcing equal protection in Alaska wrote:

> Borough reapportionment is one area that DCBD has limited regulatory powers. At the request of the Denali Borough, DCBD staff has been advising and assisting with the reapportionment issue only in its "advise and assist" role. In the present situation with the Denali Borough reapportionment efforts,

> DCBD will be able to exercise those regulatory powers *only* (*Emphasis added*) if the Denali Borough voters fail to adopt a reapportionment plan on February 19, 2002, or if a plan is adopted and fails to receive preclearance from DOJ. (App. 92)

The two conflicting letters by Ombudsman Beth Liebowitz dated August 6, 2002 and August 8, 2002 show clear intent to deceive. (App. 98, 103) The first was sent only to me, and essentially dismisses my complaint as frivolous. I only obtained the second letter in discovery prior to hiring Michael Walleri. The August 8, 2002 letter states:

> In conclusion, I have two main concerns with DCED's review of the apportionment plan. First, DCED appears to have relied heavily on the DOJ preclearance, which simply does not fulfill all of DCED's statutory requirements per AS 29.20.060 and 29.20.090. Second, DCED appears to have been exceedingly deferential to local "self-determination" during both its advisory role and its statutory review. AS 29.20.090 exists precisely to place a limit on local self-determination. (App. 111, 112)

The VRA outlawed discriminatory voting practices. Specifically, Congress intended the Act to outlaw the practice of requiring otherwise qualified voters to pass literacy tests in order to register to vote, a principal means by which southern states had prevented African-Americans from exercising the franchise. The Act established extensive federal oversight of election administration providing that

states with a history of discriminatory voting practices (so-called "covered jurisdictions") obtain "preclearance before implementing any change in voting. Like states in the former Confederacy, the entire State of Alaska is a jurisdiction covered by the VRA, because of statewide disenfranchisement of Alaska Natives *including literacy tests.* The standard of review is that the proposed change does not diminish the voting power of a racial minority. *Reno v. Bossier* Parish reiterated that preclearance by the DOJ under the Voting Rights Act does not imply compliance with equal representation.

The State of Alaska has perversely used the Voting Rights Act of 1965, and the constitutional provision for "maximum local self government" to violate the equal protection rights of all Alaskans, and the Alaska court system has acted to conceal that fact.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 13, 2009

APPENDIX A

THE SUPREME COURT OF
THE STATE OF ALASKA

DAVID P. BRAUN, Appellant, v. DENALI BOROUGH, Appellee.	Supreme Court No. S-12050 Superior Court No. 4FA-04-026161 CI OPINION No. 6305 – September 12, 2008
DAVID P. BRAUN, Appellant, v. DENALI BOROUGH, Appellee.	Supreme Court No. S-12359 Superior Court No. 4FA-02-02156 CI

Appeal in File No. S-12050 from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Charles R. Pengilly, Judge. Appeal in File No. S-12359 from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Randy M. Olsen, Judge.

Appearances: David P. Braun, pro se, Healy, Appellant. James M. Gorski, Hughes Bauman Pfiffner Gorski & Seedorf, LLC, Anchorage, for Appellee.

Before: Fabe, Chief Justice, Matthews, Eastaugh, Carpeneti, and Winfree, Justices.

FABE, Chief Justice.

I. INTRODUCTION

David Braun filed four lawsuits against the Denali Borough, challenging the 2002 and 2004 reapportionment plans adopted by Denali Borough voters. Two of these suits have resulted in appeals that we have consolidated for decision.

Braun's appeals challenge three issues in the decisions of two superior courts: (1) Judge Charles R. Pengilly's grant of summary judgment to the Denali Borough on the ground that Braun's November 2004 lawsuit was an unsuccessful election challenge to the 2004 vote on the Denali Borough reapportionment plan; (2) Judge Randy M. Olsen's decision that the 2004 Denali Borough reapportionment plan was constitutional; and (3) Judge Olsen's denial of attorney's fees to Braun for his challenge to the 2002 reapportionment plan.

We conclude that Braun is entitled to attorney's fees for his challenge to the 2002 reapportionment plan under the catalyst theory. But because the lawsuit before Judge Pengilly was indeed an unsuccessful election challenge, and because the 2004 Denali Borough reapportionment plan does not violate the equal protection clauses of the Alaska Constitution or the United States Constitution, we affirm those decisions.

II. FACTS AND PROCEEDINGS

The Denali Borough Charter, adopted in 1989, provides for a nine-seat elected assembly and calls for reapportionment "[a]s the need arises." Assembly apportionment is governed by AS 29.20.060-.120. On August 12, 2001, after the release of the 2000 census results, the Denali Borough Assembly declared itself "malapportioned." The Assembly then developed a "by-district" reapportionment proposal and presented it, along with an alternative "at-large" proposal submitted by a group of Borough voters, to the public in a special election. On February 19, 2002, the voters approved the Borough's proposed "by-district" reapportionment plan and rejected the "at-large" proposal. The total variance of the 2002 approved reapportionment plan was 11.9%.[1]

Braun and at least fifty other Denali Borough voters submitted a petition to the Department of Community and Economic Development requesting review of the reapportionment plan to determine if it

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[1] Under the one-person, one-vote doctrine, population among the districts should be equal "so that the vote of any citizen is approximately equal to that of any other citizen" in the Borough. *Hickel v. Se. Conference*, 846 P.2d 38, 47 (Alaska 1992). A total variance indicates the percentage by which a given apportionment deviates from this mathematical ideal, calculated by adding the percentage deviation of the least populated district and the percentage deviation of the most populated district. *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1356 n.1 (Alaska 1987); *Kentopp v. Anchorage*, 652 P.2d 453, 464 (Alaska 1982); *Groh v. Egan*, 526 P.2d 863, 874 (Alaska 1974).

met the equal representation standards of AS 29.20.060. The petition was received in the Department office on March 26, 2002, and after a "thorough[ ] review" of the plan and the process used to adopt it, the Commissioner determined that the plan was constitutional and issued a written decision to that effect on May 9, 2002.

Approximately one month later, Braun filed a complaint with the State of Alaska Ombudsman. He charged that the 2002 reapportionment plan's variance improperly exceeded 10%, that the plan purposefully disenfranchised Healy area voters, and that the Commissioner erred in determining that the plan was constitutional. Beth Liebowitz, counsel for the office of the Ombudsman, agreed with the Commissioner that the plan was constitutional and explained her reasoning to Braun in a detailed letter dated August 6, 2002. But two days later, Liebowitz wrote a letter to the Department director stating that "several aspects of [the Department's] review disturbed [her]" and attempted to "explain what [she] found so that [the Department] may consider these issues in future decisions." Despite characterizing the matter as a "close case in many ways," Liebowitz could not say that the Commissioner's decision was "clearly wrong" and concluded that Braun's complaints, though serious, "d[id] not necessarily establish a constitutional violation."

After Liebowitz issued her letter approving the plan, Braun appealed the Commissioner's decision to the superior court in his first complaint.[2] Then, in November 2003, the Borough held a regularly scheduled election using the district boundaries adopted in the 2002 reapportionment plan. Braun filed a separate lawsuit challenging this election.[3]

Then, in May 2004, the parties reached a settlement. Under its terms, Braun and the Borough "agreed to submit presumptively constitutional apportionment plans (with a population variance of less than 10%) to the voters, who would . . . choose an apportionment plan in the general election to be held the following November." *Braun I* would be stayed "pending voter decision of assembly apportionment in accordance with these terms" and then dismissed "[u]pon approval . . . of a constitutionally acceptable apportionment plan." Judge Wood also dismissed *Braun II* based on this settlement.

Braun and the Borough set about developing their reapportionment plans. Michael Walleri, counsel for Braun, attended an Assembly meeting and "urged the Assembly to build their plan around census blocks." He also highlighted the importance of

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[2] *Braun v. Denali Borough (Braun I)*, Case No. 4FA-02-02156 CI (2002). Judge Olsen presided over this case.

[3] *Braun v. Denali Borough (Braun II)*, Case No. 4FA-03-02607 CI (2003). Superior Court Judge Mark I. Wood presided over this case.

community representation and "strongly urged the Borough to stick to those community bases" in its new reapportionment plan. The Borough complied and drafted a proposal reapportioning its four election districts to coincide with the 2000 U.S. Census block boundaries. The 2004 Borough proposal achieved a variance of 9%. The citizen-generated plan, which was developed by Braun, featured five districts, also following census boundaries, and at-large voting. Its variance was 8.7%.

About one month before the election on the new reapportionment plan, Braun filed a third suit against the Borough, alleging that the proposal it intended to submit to voters was unconstitutional and therefore violated the settlement agreement.[4] On November 2, 2004, the voters considered both reapportionment plans; they ultimately rejected Braun's proposal and adopted the Borough's plan. On November 10, 2004, Braun filed a fourth suit against the Borough, challenging the constitutionality of the election and the plan.[5] Shortly thereafter, Braun and other voters petitioned the Department of Commerce, Community and Economic Development[6] to review

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[4] *Braun v. Denali Borough (Braun III)*, Case No. 4FA 04-02428 CI (2004). Superior Court Judge Richard D. Savell presided over this case.

[5] *Braun v. Denali Borough (Braun IV)*, Case No. 4FA 04-02616 CI (2004). Judge Pengilly presided over this case.

[6] At this point, the title of the department had changed from the Department of Community and Economic Development to the Department of Commerce, Community and Economic Development.

the newly adopted reapportionment plan for compliance with AS 29.20.060.

In early December 2004 the Borough filed a "Notice of Compliance with Settlement Agreement" in *Braun I* based on the 2004 vote. The Borough urged the court to decide the issue of attorney's fees and costs so that the case could be closed. Three days later, Braun emailed the Commissioner of the Department of Commerce, Community and Economic Development and outlined his theory on why the Borough's reapportionment plan was unconstitutional. Nonetheless, in a letter dated January 10, 2005, the Commissioner upheld the adopted plan.

On February 18, 2005, the parties met with Judge Olsen for a status conference. They agreed that the constitutionality issues related to the 2004 reapportionment election should be adjudicated by either Judge Savell or Judge Pengilly in *Braun III* or *Braun IV*. Judge Olsen consequently considered *Braun I* resolved as to all issues but attorney's fees. Coincidentally, Judge Savell (on *Braun III*) ruled on the very same day that Judge Olsen's case (*Braun I*) was the appropriate forum to consider the constitutionality of the 2004 plan.

In light of the dismissal of all issues but attorney's fees in *Braun I*, Braun moved for attorney's fees in that case on March 21, 2005. Braun argued that he was entitled to attorney's fees under the catalyst theory and that he was a public interest litigant. The Borough opposed the motion, contending that Braun

was not the prevailing party, that he was not a public interest litigant, and that the fees and costs he sought were inappropriate.

Meanwhile, Braun moved for a partial judgment and ruling in *Braun IV* that the plan and the process by which it was adopted were unconstitutional. The Borough opposed the motion, arguing (1) that the settlement agreement precluded Braun from filing new reapportionment cases and (2) that *Braun IV* was an election contest demanding a high burden of proof that Braun's complaint could not meet. In March 2005 Braun filed a supplemental motion informing Judge Pengilly that Judge Olsen would not be considering the constitutionality of the 2004 reapportionment per stipulation of the parties in *Braun I,* and that Judge Olsen and the parties anticipated Judge Pengilly would decide that issue in *Braun IV.*

Judge Pengilly heard oral argument on March 31, 2005. Two weeks later, he determined that *Braun IV* was an election contest in which Braun had failed to meet the high burden of proof required; he therefore granted the Borough's motion for summary judgment. He also decided that his court was the wrong forum to consider the constitutionality of the 2004 reapportionment and suggested three possible avenues to Braun for consideration of that issue: (1) Braun could "seek to enforce the settlement agreement in [*Braun I*] before Judge Olsen"; (2) he could seek to have the agreement set aside on the ground that it was unenforceable; or (3) he could file an

appeal of the Commissioner's decision that the apportionment plan adopted in 2004 was constitutional.

Approximately six weeks after Judge Pengilly's decision, the parties returned to Judge Olsen for a status conference. They informed him that Judge Pengilly had declined to rule on the constitutionality of the 2004 plan and they requested that Judge Olsen do so himself. As Judge Olsen recognized, the parties agreed that if the 2004 apportionment plan was found to be constitutional, "that will be the end of all questions in this case." Judge Olsen agreed to review the constitutionality of the 2004 plan and, with the input of the parties, developed a schedule for submission of evidence and briefing.

Braun's counsel, Walleri, withdrew from *Braun I*, *Braun III*, and *Braun IV* in early January 2006. Braun then filed two motions requesting direction from Judge Olsen on how to proceed. Judge Olsen responded in an order of clarification dated February 16, 2006 that the case was now solely about the constitutionality of the 2004 reapportionment plan and applicable attorney's fees. Judge Olsen stated that he would not entertain arguments on any other subject.

In a brief filed about six weeks later, Braun contended that Judge Olsen had no jurisdiction to consider the constitutionality of the 2004 plan but nonetheless argued alternatively that the 2004 plan was unconstitutional because it purposefully diluted the vote of Healy area residents. The Borough filed a

brief supporting the constitutionality of the plan on March 31, 2006, and Braun filed a reply brief reiterating his position that the court had no jurisdiction to consider the constitutionality of the 2004 plan.

Judge Olsen heard oral argument on May 5, 2006. He issued a written decision on May 15 in which he agreed with Braun that he did not have jurisdiction to consider the 2004 plan. He concluded that *Braun I* remained dismissed and that the Borough was the "nominal prevailing party." He declined to award the Borough attorney's fees because he decided that Braun was a public interest litigant. Alternatively, Judge Olsen ruled that if he did have jurisdiction to consider the constitutionality of the 2004 plan, the plan was constitutional and *Braun I* remained dismissed.

Braun moved for reconsideration, arguing that he was the prevailing party because his challenge to the 2002 reapportionment plan was successful and that he was entitled to attorney's fees. Judge Olsen denied this motion. Braun filed a second request for reconsideration, which was also denied. Judge Olsen entered judgment in favor of the Borough on July 12, 2006.

Of the four suits Braun filed in this line of cases, two have resulted in appeals: *Braun I* and *Braun IV,*

in S-12359 and S-12050.[7] In December 2006 we consolidated these cases.

III. STANDARD OF REVIEW

We review summary judgment decisions de novo, affirming the trial court's grant of summary judgment "if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law."[8] In reviewing a superior court's grant of summary judgment, we draw "all factual inferences . . . in favor of the party against whom summary judgment was entered."[9]

We review a superior court's determination of prevailing party status and attorney's fees for abuse of discretion.[10] We will overturn such determinations only if they are manifestly unreasonable.[11] With respect to the constitutionality of reapportionment plans, our review is limited in scope.[12] We have explained that "[t]hough we remain mindful of our obligation to

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[7] *Braun II* was dismissed after the negotiation of the settlement agreement. The record indicates that as of May 2006, all *Braun III* claims but one, an Open Meetings Act claim, had been dismissed. We are unaware of any appeal in that case.

[8] *Brannon v. Cont'l Cas. Co.*, 137 P.3d 280, 284 (Alaska 2006).

[9] *Id.*

[10] *Bromley v. Mitchell*, 902 P.2d 797, 804 (Alaska 1995).

[11] *Id.*

[12] *Kentopp v. Anchorage*, 652 P.2d 453, 462 (Alaska 1982).

assure compliance with all constitutional guarantees, we will not lightly interfere with the reapportionment process."[13] We accord deference to the legislature in this inquiry,[14] and a reapportionment plan "will be upheld if reasonable and not arbitrary."[15]

Review of an administrative decision calls for deference to the administrative agency when the issue is a question of law requiring agency expertise[16] or a question of fact.[17]

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[13] *Id.*

[14] *See id.* ("Deference similar to that owed the Governor in fashioning a state reapportionment plan is due the Anchorage Assembly in its decisions regarding the adoption of a municipal reapportionment plan.").

[15] *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1363 (Alaska 1987).

[16] *Premera Blue Cross v. State, Dep't of Commerce, Cmty. & Econ. Dev., Div. of Ins.*, 171 P.3d 1110, 1115 (Alaska 2007) ("In questions of law involving an agency's expertise . . . a rational basis standard is applied and we defer to an agency's determination so long as it is reasonable.").

[17] *Halter v. State, Dep't of Commerce & Econ. Dev., Med. Bd.*, 990 P.2d 1035, 1037 (Alaska 1999) (stating that "review of the Board's factual findings is limited to whether there was substantial evidence in the record to support the Board's findings"); *see also Ketchikan Gateway Borough v. Ketchikan Indian Corp.*, 75 P.3d 1042, 1045 (Alaska 2003) (noting that the substantial evidence test is deferential).

IV. DISCUSSION

A. Braun Is Entitled to Attorney's Fees and Costs for His Challenge of the 2002 Reapportionment Plan Under the Catalyst Theory.

In *Braun I,* Braun challenged the constitutionality of the 2002 reapportionment plan. The case was conditionally resolved through a settlement agreement negotiated by the parties in May 2004.[18] The settlement agreement provided that Denali Borough voters would be presented with two "presumptively constitutional" apportionment plans[19] – one submitted by the Borough, the other submitted by a citizen – in the next election. Braun submitted the citizen-generated reapportionment plan, which was presented to Denali Borough voters alongside the Borough's

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[18] The settlement agreement stayed the case "pending voter decision of assembly apportionment in accordance with the[ ] terms" outlined in the agreement, and it conditioned dismissal of the case "[u]pon approval by the voters of a constitutionally acceptable apportionment plan."

[19] Reapportionment plans with variances under 10% are "prima facie constitutional." *Kenai,* 743 P.2d 1352, 1366-67 (Alaska 1987); *see also Groh v. Egan,* 526 P.2d 863, 877 (Alaska 1974). Though the 1998 amendments to article VI of the Alaska Constitution may affect the applicability of this rule to legislative apportionments, as discussed in *In re 2001 Redistricting Cases,* 44 P.3d 141, 145-46 (Alaska 2002), they do not affect the applicability of the rule to municipal apportionments. The plain language of article VI, section 6 makes clear that the section applies only to house and senate district boundaries drawn by the Redistricting Board. Municipal apportionment plans are governed instead by statute. *See* AS 29.20.060-.120.

plan in the following election. The voters opted for the Borough's plan rather than Braun's.

Braun moved for attorney's fees in *Braun I* on March 21, 2005. The Borough opposed. Judge Olsen denied the motion as premature but later ruled on the issue in May 2006, declining to award Braun attorney's fees "because [Braun's] challenge to the 2002 apportionment scheme ha[d] not been successful" and because "[t]he small modification in the 2004 scheme[20] would not change this conclusion."

Braun argues that his lawsuit led the Borough to withdraw the 2002 plan, which had a variance over the 10% prima facie constitutional limit, and to develop the 2004 plan that was prima facie constitutional. He contends that this fact alone makes him the prevailing party. He incorporates the arguments made in his March 2005 motion for attorney's fees, which were grounded in the catalyst theory.

We have held that the prevailing party is the one who succeeds on the main issue.[21] A party need not prevail on every issue to enjoy prevailing party status,[22] nor need he achieve "formal judicial relief."[23] Under the catalyst theory, a plaintiff who settles

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[20] In its 2004 reapportionment plan, the Borough achieved a variance of 9%, versus the 11.9% variance of the previous plan.

[21] *Halloran v. State, Div. of Elections*, 115 P.3d 547, 553 (Alaska 2005).

[22] *Id.*

[23] *DeSalvo v. Bryant*, 42 P.3d 525, 530 (Alaska 2002).

enjoys prevailing party status if he proves: (1) that the goal of his litigation was achieved, meaning that he succeeded on a significant issue and achieved a benefit for which the suit was brought, and (2) that his lawsuit was a catalyst in motivating the defendant to settle.[24] Once the plaintiff makes this prima facie case, he is entitled to Rule 82(b)(2) attorney's fees unless the defendant proves that his lawsuit "lacked colorable merit."[25]

Here, both prongs of the test have been fulfilled. The first question is whether motivating the Borough to set aside the 2002 plan and to develop a new one constitutes "success" for Braun on the main issue of his case – challenging the constitutionality of the 2002 reapportionment plan. Braun argues that the settlement agreement, particularly the replacement of an over-10% variance plan with a prima facie constitutional, sub-10% variance plan, proves that his suit was a success. Conversely, the Borough maintains that its participation in the settlement agreement does not constitute an admission that the 2002 plan was unconstitutional, but rather evidences a practical desire to avoid litigation. But the Borough itself has stated that the settlement agreement "gave [Braun] nearly everything he asked for in his complaint." Braun challenged the constitutionality of the 2002 reapportionment plan, and as a result of his

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[24] *Id.*

[25] *Id.*

suit, the Borough withdrew that plan and replaced it with a prima facie constitutional one. As to the second prong, the Borough developed the 2004 reapportionment plan and presented it to the voters in furtherance of its settlement agreement with Braun. Braun is entitled to appropriate attorney's fees and costs under the catalyst theory.[26]

B. The Superior Court Did Not Err in Deciding that the 2004 Denali Borough Reapportionment Plan Was Constitutional.

Braun argues that the reapportionment plan adopted by Denali Borough voters in 2004 violates the equal protection guarantees of both the United States and Alaska Constitutions. The 2004 Denali Borough reapportionment plan provides for four voting districts with borders defined by the U.S. census blocks. Under the plan, (1) 609 of the total 1,893 Denali Borough voters are in the North District, meriting three of the nine assembly seats; (2) 212 are in the East Central District, meriting one assembly seat; (3) 850 are counted in the West Central District, meriting four assembly seats; and (4) 222 are counted in the South District, meriting one

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[26] We note that the Borough has conceded that Braun is a public interest litigant as to the merits of his constitutionality challenge, and in his May 2006 decision, Judge Olsen determined that Braun was a public interest litigant.

assembly seat.[27] Braun contends that these district lines have been drawn to split Healy area voters, who number 1,000 of the 1,893 total Borough voters, by improperly combining some of them with other districts. According to Braun, this arrangement provides fewer assembly seats for Healy area voters than the majority they deserve, diluting their vote and improperly denying them majority control. Braun also complains that the plan provides Cantwell (in the South District) and Anderson (in the North District) enough seats together to "block an attempted override of the mayor's veto by representatives of over two thirds of borough residents," which he believes is improper since Anderson and Cantwell number only 589 residents.

The Borough maintains that the plan is presumptively constitutional and moreover that it is constitutional in fact. In his May 2006 opinion, Judge Olsen based his dismissal of Braun's constitutional claims on two alternative grounds: (1) that he did not have jurisdiction to consider the constitutionality of

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[27] The trial court noted that "[t]he Denali Borough, at 12,000 square miles, is larger than nine of the states of the United States." With only 1,893 residents, its average population density is 0.1 person per square mile, and the majority of census blocks contain no or virtually no residents. Braun agrees that the Borough "does have a large area and a small population," and the Borough comments that "equaliz[ing] election districts in lightly populated rural boroughs" is particularly challenging. Indeed, we have noted before that "[r]edistricting in Alaska is a task of Herculean proportions." *In re 2001 Redistricting Cases*, 44 P.3d 141, 147 (Alaska 2002).

the 2004 plan or (2) if he did have jurisdiction, that the 2004 plan was constitutional, thereby fulfilling the settlement agreement.

1. Judge Olsen did not lack jurisdiction to consider the constitutionality of the 2004 reapportionment plan.

As he contended below, Braun argues on appeal that Judge Olsen did not have jurisdiction to consider the 2004 reapportionment plan. We disagree. At the May 2005 status conference before Judge Olsen, the parties stipulated that Judge Olsen's case was the correct forum to decide this discrete issue, and Judge Olsen, Braun, and the Borough developed a schedule for submission of evidence and briefing accordingly. The case moved forward in that court, and the February 2006 order of clarification reiterated that the only issue to be decided was the constitutionality of the 2004 reapportionment plan. It was not until late March 2006, ten months after the parties stipulated that the case belonged before Judge Olsen, that Braun changed course and argued that Judge Olsen did not have jurisdiction.

Braun's eleventh-hour argument that Judge Olsen lacked jurisdiction to decide the issue is belied by two factors: (1) the constitutionality of the 2004 plan directly affected the settlement agreement in the case originally assigned to Judge Olsen (*Braun I*) and (2) the parties stipulated that the case before Judge

Olsen was an appropriate forum to decide the issue, and they litigated it there to completion. After extensive briefing from both parties on the constitutionality of the 2004 plan, Judge Olsen issued a decision resolving the question. Judge Olsen had jurisdiction to decide the constitutionality of the plan.

2. The superior court did not err in affirming the constitutionality of the 2004 Denali Borough reapportionment plan.

Braun and other voters petitioned the Department of Commerce, Community and Economic Development to review the constitutionality of the 2004 reapportionment plan. The Commissioner issued a written decision concluding that the plan was constitutional. In his May 2006 opinion, Judge Olsen upheld the Commissioner's decision, stating that "the deference granted to the voters who adopted the [2004 reapportionment] scheme in the first place, and to the Commissioner who reviewed the scheme in the second place, would prevent the court from reversing the decision of the Commissioner." Under our precedent, that deference was appropriate. In *Kentopp v. Anchorage,* we likened the deference due a municipal assembly in adopting a municipal reapportionment plan to the deference the Governor enjoys in fashioning a state reapportionment plan.[28] We explained that

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[28] 652 P.2d 453, 462 (Alaska 1982).

"the formulation of a reapportionment plan is a decidedly political process" in which we would "not lightly interfere," though we recognized our obligation "to assure compliance with all constitutional guarantees."[29] We characterized our review of reapportionment plans as "limited" and stated we would validate them as long as they were reasonable and not arbitrary.[30] With that in mind, we examine Braun's equal protection claims in turn.

a. The 2004 Denali Borough reapportionment plan does not violate the federal Equal Protection Clause.

Two fundamental principles govern our analysis of Braun's federal Equal Protection Clause claim. In our federal equal protection analysis in *Kenai Peninsula Borough,* we recognized that

> in the context of voting rights in redistricting and reapportionment litigation, there are two basic principles of equal protection, namely that of "one person, one vote" – the right to an equally weighted vote – and of "fair and effective representation" – the right

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[29] *Id.*

[30] *Id.*; *see also Kenai Peninsula Borough v. State,* 743 P.2d 1352, 1363 (Alaska 1987).

> to group effectiveness or an equally powerful vote.[31]

We have held that an apportionment plan with a variance under 10% falls in a category of minor deviations and meets the quantitative standard of one person, one vote.[32] It is undisputed that the variance of the 2004 reapportionment plan is under 10%. The 2004 reapportionment plan therefore meets the first element of the *Kenai* test.

The second element of the test requires that the plan provide fair and effective representation to voters. Examining this issue in *Kenai,* we cited the United States Supreme Court's plurality decision in *Davis v. Bandemer,* which held that an equal protection violation

> may be found only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively. In this context, such a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.[33]

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[31] 743 P.2d at 1366.

[32] *Id.* at 1366-67.

[33] *Id.* at 1369 (quoting *Davis v. Bandemer,* 478 U.S. 109, 133 (1986)).

As we discussed in *Kenai,* a successful constitutional claim in the political context requires proof not only of purposeful discrimination but also proof that a group of voters is being "consistently and substantially excluded from the political process [and] denied political effectiveness over a period of more than one election."[34] In *Kenai,* we held a reapportionment plan did not violate the federal Equal Protection Clause because it had not been proven that the Board attempted to consistently and substantially deny voters representation, and because the Reapportionment Board's goal was to create proportionality.[35]

Here, Braun has not met his burden of proving that Denali Borough voters are being "consistently and substantially excluded from the political process." Braun argues that

> the Denali Borough has over *many* elections impermissibly discriminated against borough residents by 1) providing for weighted voting, 2) not providing for majority rule, 3) not providing as nearly as practicable for relatively integrated socio-economic areas and, 4) unnecessarily depriving rural residents of representation.

But these arguments against the 2004 plan are unavailing. The variance of the 2004 plan is under 10%, which we have held is prima facie constitutional

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[34] *Id.*

[35] *Id.* at 1370, 1372.

and insufficient to prove weighted voting.[36] Braun claims that the Healy area population, which constitutes a majority of Denali Borough residents, is being improperly deprived of majority control in the Assembly. But as we have explained before:

> *Kenai Peninsula Borough* does not entitle political subdivisions to control a particular number of seats based upon their populations. *Kenai Peninsula Borough* simply held that the board cannot intentionally discriminate against a borough or any other politically salient class of voters by invidiously minimizing that class's right to an equally effective vote.[37]

Moreover, the Borough's plan was adopted over Braun's by a majority vote. And his claim that rural residents are being deprived of representation does not find support in the record.

Though he does not cite it, the third factor Braun lists, which concerns integrated socio-economic areas, refers to language from article VI, section 6 of the Alaska Constitution. But article VI governs legislative apportionment, not municipal apportionment.[38] Municipal apportionment is governed by statute.[39]

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[36] *Id.* at 1366-67.

[37] *In re 2001 Redistricting Cases*, 44 P.3d 141, 144 (Alaska 2002) (quotations omitted).

[38] The plain language of article VI makes it clear that it governs senate and house apportionment. Alaska Const. art. VI.

[39] *See* AS 29.20.060-.120.

Furthermore, the language Braun cites is specific to apportionment of *house districts,*[40] and we have declined to extend this language even to apportionment of senate districts,[41] which, unlike municipal apportionments, are legislative in nature and implicated elsewhere in article VI. To the extent that Braun's argument is not a reference to article VI but instead a broader attack on the quality of the 2004 plan for its failure to "provid[e] as nearly as practicable for relatively integrated socio-economic areas," that contention calls on this court to decide whether the 2004 reapportionment plan is the best plan, rather than whether it is simply constitutional. We are authorized to consider only the latter. As we noted in *Kentopp*:

> It cannot be said that what we may deem to be an unwise choice of any particular provision of a reapportionment plan from among several reasonable and constitutional alternatives constitutes "error" which would invoke the jurisdiction of the courts.[42]

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[40] "Each house district shall be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area." Alaska Const. art. VI, § 6.

[41] *Kenai,* 743 P.2d at 1365 ("[W]e hold that the provisions of article VI, section 6 which set forth socio-economic integration, compactness and contiguity requirements are inapplicable to redistricting and reapportionment of senate districts.").

[42] 652 P.2d at 462.

Nor has Braun proven the purposefulness of the exclusion he alleges, as *Kenai* requires,[43] beyond his own conclusory statements. Even the Liebowitz letter addressed to the Department director, which refers to the 2002 plan, not the 2004 plan, states only that Liebowitz found "evidence – not proof, but evidence – that the district lines were drawn for the specific purpose of preserving three assembly seats for the Anderson/Clear district."

Ultimately, as Braun has recognized, the basis of his constitutional claim is "a very fact-intensive inquiry." But in the context of reapportionment plans, our review is deferential; as long as the reapportionment plan is "reasonable and not arbitrary,"[44] we must uphold it. In light of the *Kenai* standard to prove a constitutional claim in reapportionment cases, and in light of the deference accorded to the Assembly and the Commissioner in this context,[45] Braun's federal equal protection claim fails.

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[43] 743 P.2d at 1369 ("In summation, proof of purposeful discrimination alone is insufficient to state a cause of action for political gerrymandering. The plurality in *Bandemer* would require additional proof that the group has been consistently and substantially excluded from the political process . . . in order to raise a constitutional claim.").

[44] *Kentopp*, 652 P.2d at 462; *Kenai*, 743 P.2d at 1363.

[45] The Borough characterizes Braun's attack on the constitutionality of the 2004 plan as an administrative appeal. Braun contests this characterization and points out that his case challenging the constitutionality of the 2004 plan was filed before administrative review of the plan was completed. But we

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b. The 2004 Denali Borough reapportionment plan does not violate the Alaska equal protection clause.

We employ a three-part test to evaluate equal protection challenges under the Alaska Constitution.[46] We first consider what weight is afforded the constitutional interest impaired by the challenged action.[47] We next consider the purposes served by the challenged action, and we evaluate lastly the state's interest in the particular means used to achieve those purposes.[48] In the context of reapportionment cases, the Alaska Constitution's equal protection standard is stricter than its federal counterpart.[49]

In examining whether an apportionment plan violated the equal protection clause of the Alaska Constitution, we held in *Kenai* that "a voter's right to an equally geographically effective or powerful vote" is, "while not a fundamental right, . . . a significant constitutional interest."[50] The right of Healy area voters to be grouped in one district and enjoy

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need not reach this dispute because it does not affect the result. Under *Kentopp* and *Kenai*, our review of reapportionment plans must be deferential.

[46] *Kenai*, 743 P.2d at 1371.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.* at 1372.

majority control in the Assembly is therefore significant, but not fundamental.

Next, we must consider what purposes are served by the challenged action. In *Kenai,* it was undisputed that the Board deliberately fashioned the reapportionment plan to prevent another "Anchorage" seat.[51] Once a discriminatory intent is proven, "redistricting will be held illegitimate unless that redistricting effects a greater proportionality of representation."[52] Because the Board's intent in *Kenai* was facially discriminatory, and because its effect was to create greater disproportion, we held that the redistricting plan violated the equal protection clause of the Alaska Constitution.[53]

But here, Braun has not proven that the 2004 reapportionment plan was developed to purposefully disenfranchise Healy area voters. Beyond his own conclusory statements and the qualified concern Liebowitz expressed regarding the 2002 plan, which she described as "evidence – not proof, but evidence" that the district lines may have been drawn for a specific purpose, there is nothing in the record proving the Borough's intent to disenfranchise Healy area voters in the 2004 plan. Indeed, the Commissioner, to whose view we accord deference on questions of law requiring agency expertise and on questions of fact,

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[51] *Id.* at 1370.

[52] *Id.* at 1372.

[53] *Id.* at 1372-73.

explicitly determined that the district lines were *not* drawn to achieve any particular outcome. As discussed above, Braun's constitutional claim is "a very fact-intensive inquiry," and as long as the reapportionment plan is "reasonable and not arbitrary,"[54] we must uphold it. Braun has not established that the Borough intentionally discriminated against Healy area voters in developing the 2004 plan, and he has not overcome the deference we accord the Assembly and the Commissioner in the reapportionment context.[55] His equal protection claim under the Alaska Constitution fails.

C. The Superior Court Did Not Err in Determining that *Braun IV* Was an Election Contest and in Granting the Borough's Motion for Summary Judgment.

Judge Pengilly granted the Borough's motion for summary judgment in *Braun IV* because he concluded that the case was an unsuccessful election challenge. Braun appeals that conclusion.

The purpose of an election contest is "to ascertain whether the alleged impropriety in fact establishes

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[54] *Kentopp*, 652 P.2d at 462.

[55] *See id.*

doubt as to the validity of the election result."[56] For this reason, "[w]hether a cause of action should be deemed an election contest [] turns on the remedy sought."[57] If the plaintiff's proposed remedy "would defeat the public interest in the stability and finality of election results, it is appropriate to deem the cause of action an election contest and to require compliance with the procedures for such contests."[58] A cause of action is deemed not to be an election challenge only if "the remedy will not affect the stability and finality of the election result."[59]

Braun asserts that his lawsuit is "ultimately a claim for judicial review of [the Borough's] plan of apportionment," and that it does not "challenge the validity of the election result approving the 2004 apportionment."[60] But the remedy he sought before

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[56] *Walleri v. City of Fairbanks*, 964 P.2d 463, 466 (Alaska 1998) (quoting *Boucher v. Bomhoff*, 495 P.2d 77, 80 (Alaska 1972)).

[57] *Walleri*, 964 P.2d at 466; *see also DeNardo v. Municipality of Anchorage*, 105 P.3d 136, 140 (Alaska 2005) (holding that a cause of action was an election challenge where the plaintiffs sought "to void Proposition 2, a remedy that would both overturn the proposition and mandate a runoff in the mayoral election").

[58] *Walleri*, 964 P.2d at 466.

[59] *Id.*

[60] In the first paragraph of the *Braun IV* complaint, Braun stated: "This is an election contest seeking judicial review of the regular election held in the Denali Borough on the 2nd day of November 2004." In his appeal, Braun argues this phrasing was "a procedural error by a pro se litigant" and mischaracterizes his

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Judge Pengilly was "a judgment prohibiting the use of the reapportionment plan ... approved by the voters on November 2, 2004 in future elections." And in his October 2007 reply brief for the consolidated case, Braun asked that we

> [e]nter a judgment declaring that the apportionment plans approved by voters in the February 19, 2002 special election and the November 2, 2004 regular election violated the state and federal constitutions *and order the results of those elections void*[.]

(Emphasis added.) Applying this remedy would clearly "defeat the public interest in the stability and finality of election results"[61] by nullifying the 2004 elections. Moreover, the 2004 election was itself held pursuant to a settlement that invalidated the 2002 election. If the next reapportionment scheme is also put before the electorate, it would be the third election on the subject – a situation that, in itself, would seriously undermine the public's confidence in the finality of election results. The superior court did not err in concluding that his case was an election challenge.

We next consider, viewing the evidence in the light most favorable to Braun, whether the superior

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claim. But Judge Pengilly did not mention this paragraph in his decision; he concluded *Braun IV* was an election challenge on independent grounds.

[61] *Walleri*, 964 P.2d at 466.

court erred in concluding Braun's election challenge was unsuccessful as a matter of law. Under AS 15.20.540, an election may be contested on the following grounds: "(1) malconduct, fraud, or corruption on the part of an election official sufficient to change the result of the election; (2) when the person certified as elected or nominated is not qualified as required by law; [or] (3) any corrupt practice as defined by law sufficient to change the results of the election." We "apply a higher standard of review for post-election challenges to ballot language than . . . [for] pre-election challenges."[62] In a post-election challenge such as the one at bar, it is insufficient to establish "a lack of total and exact compliance with the constitutionally and statutorily prescribed form of ballot."[63] Rather, the challenging party has "the dual burden of showing that 'there was both a significant deviation from statutory direction, and that the deviation was of a magnitude sufficient to change the result of the election.'"[64]

Here, Braun made clear both in oral argument before Judge Pengilly and in his briefing to this court that he challenges the constitutionality of the 2004 election's subject matter, not the fairness of its procedures. Braun does not claim, and nothing in the record indicates, that the November 2004 election

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[62] *DeNardo*, 105 P.3d at 141.

[63] *Boucher*, 495 P.2d at 80.

[64] *Denardo*, 105 P.3d at 141 (quoting *Dansereau v. Ulmer*, 903 P.2d 555, 559 (Alaska 1995)).

was marred by "malconduct, fraud, or corruption on the part of an election official sufficient to change the result of the election" or by "any corrupt practice as defined by law sufficient to change the results of the election."[65] Nor does Braun claim that a "person certified as elected or nominated is not qualified as required by law."[66] Braun's election challenge does not adhere to the grounds outlined in AS 15.20.540, nor has he proven the "significant deviation from statutory direction . . . sufficient to change the result of the election" that is required in a successful election challenge.[67] Judge Pengilly did not err in concluding that Braun's election challenge was unsuccessful as a matter of law.

D. Braun's Other Claims in *Braun IV* Are Meritless.

Braun raises three additional claims in his appeal of *Braun IV*: (1) that both Judge Pengilly's decision directing Braun to seek relief before Judge Olsen and the settlement agreement itself "created a process that is contrary to established law"; (2) that "the trial courts"[68] erred by "not demanding discovery and [by] allowing the opposing attorneys and the

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[65] AS 15.20.540.

[66] *Id.*

[67] *Denardo*, 105 P.3d at 141 (quotations omitted).

[68] Braun does not specify which trial courts he means, although his subsequent discussion mentions both "the Olsen case" (*Braun I*) and "the Pengilly case" (*Braun IV*).

State of Alaska to withhold evidence"; and (3) that the superior court judges who have adjudicated his lawsuits are biased and "have facilitated efforts to avoid discovery and cover up evidence of illegal actions by the State of Alaska and the Denali Borough."

1. Braun's claims regarding the creation of a "process that is contrary to established law" fail.

Braun claims that Judge Pengilly "created a process that is contrary to established law" by directing Braun to seek relief in the case before Judge Olsen, and that "there is no provision in [the] Alaska Statutes for successive remedies to be challenged in this manner." But as discussed above, the case before Judge Pengilly (*Braun IV*) was inextricably linked to the case before Judge Olsen (*Braun I*) because the settlement brokered to resolve *Braun I* hinged on the constitutionality of the 2004 reapportionment plan, a subject implicated in *Braun IV*. For the same reason that Judge Olsen had jurisdiction to consider the constitutionality of the 2004 plan, Judge Pengilly's decision directing Braun to seek relief in the case before Judge Olsen did not "create [ ] a process that is contrary to established law." Similarly, Braun's argument that the settlement agreement created a process contrary to law because it "allow[ed] the Denali Borough to delay 'fair and effective representation' . . . in Denali Borough by repeatedly putting forth illegal apportionment plans" must fail as we

have already concluded that the 2004 reapportionment plan is constitutional.

2. The trial courts did not err in their treatment of discovery as Braun alleges.

Braun argues that the trial courts erred in their treatment of discovery by "not demanding discovery and [by] allowing the opposing attorneys and the State of Alaska to withhold evidence." But Braun did not preserve this objection for appeal because he did not request discovery in *Braun IV,* a point the Borough makes and Braun does not contest.[69] Moreover, even had he done so, the issue would be moot. Because Braun conceded that he was not contesting the procedures by which the 2004 election was held, no amount of evidence would transform *Braun IV* into a valid election challenge. Nor has Braun preserved a discovery objection in *Braun I,* for as he notes, the parties chose to forgo discovery in that case on the issue of constitutionality.[70]

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[69] *See Duffus v. Duffus,* 72 P.3d 313, 317 (Alaska 2003) (noting that "we have long adhered to the tenet that matters not raised at trial will not be considered on appeal" (quotations omitted)).

[70] Braun states in his brief that "Mr. Walleri [counsel for Braun] and Mr. Gorski [counsel for the Borough] agreed, for their own reasons, to [forgo] discovery relative to the equal protection issue. . . ."

3. Braun's claim of bias fails.

Braun's next claim is a general allegation of bias and judicial misconduct on the part of the judges who have presided over his various lawsuits:

> The record indicates that [t]rial [c]ourt [j]udges were "manifestly erroneous," not impartial, and have facilitated efforts to avoid discovery and cover up evidence of illegal actions by the State of Alaska and the Denali Borough. I argue that some in the Fairbanks Court are aiding the State of Alaska, the Denali Borough and Mr. Walleri in an attempt to quash my appeal before this court.

Braun also accuses his former attorney of deliberately withholding crucial evidence and claims that permitting the attorney to withdraw from his cases without appointing a replacement was an example of misconduct on the part of the courts involved.[71] The "overall plan," Braun asserts, "appears to be to narrow the focus and withhold evidence in [Judge Olsen's case] so that my prosecution of that case fails for lack of evidence."

As we have noted, "the Alaska Code of Judicial Conduct requires that [i]n the performance of judicial duties, a judge shall act without bias and prejudice

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[71] Braun states that he fired Walleri in *Braun IV* and that two of the other judges presiding over his cases permitted Walleri to withdraw. He appears to claim that each of these judges should have appointed counsel for him.

and shall not manifest [such bias or prejudice] by words or conduct."[72] Where a judge has a "personal bias or prejudice concerning a party or a party's lawyer," that judge should be disqualified.[73] But the burden of proof is on the party alleging bias,[74] and the issuance of a ruling adverse to that party is not, in and of itself, sufficient to meet the burden.[75]

There is no evidence in the record to suggest that any of the judges involved in Braun's cases were biased against him. Declining to appoint counsel is not an indication of bias here because Braun's claims do not fall within any of the categories of civil cases for which appointment of counsel is required.[76] And we have already concluded that the trial court's

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[72] *Hanson v. Hanson*, 36 P.3d 1181, 1184 (Alaska 2001) (alteration in original) (quotations omitted).

[73] *Id.*

[74] *See, e.g., Nelson v. Jones*, 781 P.2d 964, 972 (Alaska 1989) (stating, in the context of a motion to disqualify, that the appellant "was required to establish that the prior adverse rulings were the result of personal bias developed from a nonjudicial source").

[75] *See Lacher v. Lacher*, 993 P.2d 413, 421 (Alaska 1999) (declining to reverse a trial judge's refusal to recuse himself where the appellant's claim of bias was "little more than an expression of [her] dissatisfaction with the superior court's ruling").

[76] *See, e.g., Midgett v. Cook Inlet Pre-Trial Facility*, 53 P.3d 1105, 1111 (Alaska 2002) (requiring counsel for "cases involving termination of parental rights, child custody, paternity suits, and civil contempt proceedings for nonpayment of child support" (citations omitted)).

treatment of discovery was not error. Furthermore, despite declining to decide the issue, Judge Pengilly actually provided Braun a list of "three possible methods of challenging the constitutionality of the Denali Borough voting districts." Braun's claim of bias fails.

E. Braun Is Not Entitled to Attorney's Fees in *Braun IV.*

Finally, Braun seeks a judgment declaring him to be a public interest litigant and awarding him his costs and attorney's fees in *Braun IV.* Alaska Statute 09.60.010(c)(1) provides that "[i]n a civil action . . . concerning the establishment, protection, or enforcement of a right under the United States Constitution or the Constitution of the State of Alaska, the court . . . shall award . . . full reasonable attorney fees and costs to a claimant, who, as plaintiff . . . has prevailed in asserting the right." But because Braun did not prevail on the claims he asserted in *Braun IV,* he is not entitled to attorney's fees in that action.

V. CONCLUSION

Braun is entitled to attorney's fees and costs for his challenge to the 2002 reapportionment plan under the catalyst theory. We therefore REVERSE Judge Olsen's decision to the contrary and REMAND for consideration of the appropriate award. But we AFFIRM Judge Olsen's decision upholding the constitutionality of the 2004 Denali Borough reapportionment

plan, and we AFFIRM Judge Pengilly's grant of summary judgment to the Borough regarding Braun's challenge of the 2004 election. Braun's remaining claims in *Braun IV* also fail. Accordingly, Braun is not entitled to attorney's fees in that case.

APPENDIX B

IN THE SUPERIOR COURT FOR
THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

DAVID P. BRAUN,
Plaintiff,
v.
DENALI BOROUGH,
Defendant.

Case No. 4FA-04-2616CI

MEMORANDUM DECISION

I. Introduction

This case is one of four superior court lawsuits Braun has filed contesting the constitutionality of the voting district boundaries in the Denali Borough. In the present action, Braun seeks a declaration that the November 2, 2004, regular election violated the state and federal constitutions and an order voiding the results of the election. The Borough has moved for summary judgment, and the court now grants that motion for the reasons discussed below.

II. Statement of Facts

In a February 2002 special election, voters of the Denali Borough approved a plan for voting district reapportionment. Denali Borough resident David

Braun challenged the constitutionality of the district apportionment in an administrative action with the Department of Commerce, Community and Economic Development (DCCED). Specifically, Braun argued that the 11.9% population variance between election districts exceeded the "one man, one vote" equal protection requirements of the state and federal constitutions. The Commissioner rejected Braun's challenge, finding that the apportionment plan the voters approved did not violate equal protection standards. Brawl properly appealed the Commissioner's decision to the superior court before Judge Olsen in Case No. 4FA-02-2156CI.

In November 2003, the Denali Borough held a regular election using the voting districts specified in the apportionment plan adopted in February 2002. Immediately following the November 2003 election, Braun filed what is in effect an election contest in the superior court before Judge Wood in Case No. 4FA-03-2607CI. In that case, Braun sought to have the November 2003 election declared void as unconstitutional.

In May 2004, the parties entered into a settlement agreement in Case No. 4FA-02-2156CI by which both Braun and the Denali Borough agreed to submit presumptively constitutional apportionment plans (with a population variance of less than 10%) to the voters, who would then choose an apportionment plan in the general election to be held the following November. The agreement was contingent on the voters choosing a constitutionally valid apportionment plan,

Judge Wood dismissed Case No. 4FA-03-26070 based on the settlement agreement in Judge Olsen's case.

Roughly one month before the 2004 election, Braun filed Case No. 4FA-04-2428CI before Judge Savell, in which he argued that the apportionment plan proposed by the Borough was not constitutional and therefore in violation of the settlement agreement. The election was held November 2, 2004, and the voters adopted the Borough's apportionment plan.

On November 10, 2004, Braun filed the present case, in which he argues that the election was itself unconstitutional because the voters adopted an unconstitutional plan. Braun seeks a court order declaring the November 2004 election void because it violated federal and state equal protection standards.

On November 22, 2004, Braun filed a petition with the DCCED challenging the district apportionment plan adopted in the November election. The Commissioner issued a January 10, 2005, decision finding the plan met the equal protection standards of AS 29.20.060. Braun has not appealed that decision.

In February 2005, the parties met before Judge Olsen and stipulated that the constitutional issues should be addressed in the present case before this court. Judge Olsen then dismissed his case as to all issues except attorneys' fees. Coincidentally, on that same day, Judge Savell issued his opinion denying Braun's Motion for Summary Judgment and ordering that the appropriate context for challenging the

constitutionality of the apportionment plan was in seeking to enforce the settlement agreement in the administrative appeal before Judge Olsen.

Braun has withdrawn his Motion for Summary Judgment in the case before this court, and therefore this opinion addresses the Borough's motion only. The Borough argues that Braun has in effect filed an election contest, and that his constitutional challenge is therefore subject to the heightened standards of review associated with election contests. The Borough argues Braun is unable to meet the high burden.

III. Standard of Review

A court may grant a party's motion for summary judgment where the moving party has shown that "there is no genuine issue as to any material fact and that [the] party is entitled to a judgment as a matter of law."[1] Where facts are in dispute, "all reasonable factual inferences must be drawn in favor of the non-movant. The movant bears the burden of proving the absence of material facts."[2] If the movant makes this showing, the burden then shifts to the non-moving party to demonstrate the existence of admissible

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[1] Alaska R. Civ. Pro. 56(c).

[2] *Lincoln v. Interior. Regional Hous. Auth.*, 30 P.3d 582, 586 (Alaska 2001) (citing *Bishop v. Mun. of Anchorage*, 899 P.2d 149, 153 (Alaska 1995)).

evidence pointing to genuine issues of material fact precluding summary judgment.[3]

IV. Analysis

A. This case is an election contest.

AS 15.20.540 specifies the grounds upon which an election may be contested:

> A defeated candidate or 10 qualified voters may contest the nomination or election of any person or the approval or rejection of any question or proposition upon one or more of the following grounds: (1) malconduct, fraud, or corruption on the part of an election official sufficient to change the result of the election; (2) when the person certified as elected or nominated is not qualified as required by law; (3) any corrupt practice as defined by law sufficient to change the results of the election.[4]

The Alaska Supreme Court has clarified that "malconduct" as used in the statute constitutes any "significant deviation from statutorily or constitutionally prescribed norms."[5]

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[3] *Id.* (citing *French v. Jadon, Inc.*, 991 P.2d 20, 23 (Alaska 1996)).

[4] AS 15.20.540.

[5] *Hammond v. Hickel*, 588 P.2d 256, 258 (Alaska 1978), cert. denied, 441 U.S. 907 (1979).

In the recent opinion *DeNardo v. Municipality of Anchorage*, the Alaska Supreme Court explained that whether a particular challenge should be treated as an election contest depends on the remedy the plaintiff is seeking.[6] Where granting the plaintiff the relief sought would "defeat the public interest in the stability and finality of election results," a cause of action should be deemed an election contest.[7]

Here, Braun seeks to void the November election. Nullifying the election would certainly upset the public's ability to depend on the finality of election results. There is thus no question that this case must be deemed an election contest.

B. Braun is unable to meet the high proof standard of an election contest.

DeNardo further explained the proof standard a plaintiff must meet to successfully contest an election.[8] The court determined that the standard in an election contest is necessarily more stringent than in a pre-election challenge to "discourag[e] parties from mounting post-election challenges just because they are displeased with the results of a given election."[9] A plaintiff contesting an election must "show more than a lack of total and exact compliance with the

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[6] 105 P.3d 136, 140 (Alaska 2005).

[7] *DeNardo*, 105 P.3d at 140.

[8] *Id.* at 140.

[9] *Id.*

constitutionally and statutorily prescribed form of ballot."[10] Malconduct, as it relates to the election contest statute, is defined as "a significant deviation from the prescribed form . . . of a magnitude sufficient to change the result of . . . election."[11] Therefore, to succesfully overturn the November 2004 apportionment election, Braun must demonstrate that 1) the election process significantly deviated from statutory direction; and 2) that the deviation was of a magnitude sufficient to change the result of the election.[12]

It is important to distinguish between the procedure of an election and the subject of an election. Braun in effect is challenging the constitutionality of the subject of the November 2004 election, while an election contest is in itself a challenge to the fairness of election procedures. Braun conceded at the March 31, 2005, oral argument on this motion that he does not contest the appropriateness of the election procedures the Borough followed in the November 2004 election and that his challenge is to the constitutionality of the apportionment plan the voters chose. Braun is unable to meet the high burden of proving the procedures followed in that election significantly deviated from statutory direction or that any deviation was significant enough that, if

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[10] *Id.* at 141 (citing *Boucher v. Bomhoff*, 495 P.2d 77, 80 (Alaska 1972)).

[11] *Id.* (citing *Boucher*, 495 P.2d at 80).

[12] *DeNardo*, 105 P.3d at 140 (citing *Dansereau v. Ulmer*, 903 P.2d 555, 559 (Alaska 1995)).

corrected, the outcome of the election would have been altered.

C. Braun may not argue the constitutionality of the apportionment plan in this case.

While he has filed four separate lawsuits in superior court, Braun has yet to obtain judicial review of the merits of his case. He is entitled to superior court review of his argument that the existing apportionment plan in the Denali Borough violates equal protection standards. However, the present case is an election contest, and Braun may not argue the constitutionality of the proposed apportionment plan here. Braun has three possible methods of challenging the constitutionality of the Denali Borough voting districts. The first two possibilities concern the settlement agreement the parties entered into in Judge Olsen's case.

1. Braun may seek to enforce the settlement agreement in Case No. 4FA-02-2156CI.

The settlement agreement Braun and the Borough entered into in Judge Olsen's case required each party to present a proposed apportionment plan to the voters, and the parties stipulated the case would be dismissed once the voters chose a constitutionally valid plan. Braun argues that the plan adopted by the voters, which had been the Borough's proposal, was unconstitutional, and therefore that the Borough

breached its promise to present a presumptively constitutional plan to the voters. Braun may seek to enforce the settlement agreement in the administrative appeal before Judge Olsen.

2. Braun may seek to set aside the settlement agreement in Case No. 4FA-02-2156CI.

Braun agreed that the action he filed challenging the constitutionality of the apportionment plan could be dismissed upon adoption of a constitutional apportionment plan. In effect, he promised the Borough nothing, and the agreement is illusory and likely unenforceable. Braun may seek to set aside the settlement agreement and resume his constitutional challenge in the administrative appeal before Judge Olsen.

3. Braun may file a second administrative appeal.

Finally, Braun's only other option is to file an appeal in superior court of the January 10, 2005, administrative decision in which the DCCED Commissioner verified the constitutionality of the apportionment plan adopted by the voters in the November 2004 election. While the appeal time is thirty days, Appellate Rule 602 states that the appeal time does not begin running until the administrative agency

issues a decision clearly stating it is a final decision and the claimant has thirty days to appeal.[13] Here, it is arguable that the Commissioner did not comply with those requirements. Braun may still be able to file a timely appeal of the administrative decision.

V. CONCLUSION

The Borough's Motion for Summary Judgment is GRANTED.

Dated this 14th day of April, 2005, at Fairbanks, Alaska.

/s/ Charles Pengilly
CHARLES R. PENGILLY
Superior Court Judge

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[13] ALASKA R. APP. P. 602(a)(2)

APPENDIX C

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

DAVID P. BRAUN,
Appellant,
v.
DENALI BOROUGH,
Appellee.

Case No. 4FA-02-2156 CI

MEMORANDUM DECISION AND ORDER

The Denali Borough, at 12,000 square miles, is larger than nine of the states of the United States.[1] Its population of approximately 1,900 persons is housed in 785 households in the Borough.[2] The population is generally located in a few towns and along the Parks Highway. The Denali Borough includes Anderson, Healy, and Cantwell.[3] David Braun resides in the Healy area of the Denali Borough.[4]

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[1] Appellee's Brief at 26, fn. 21.

[2] Appellee's Brief at 26.

[3] Amended Complaint ¶ 10; Answer to Amended Complaint ¶ 10.

[4] Complaint p. 16 (dated Aug. 28, 2002) (plaintiff's address in Healy); *see also* Amended Complaint ¶¶ 26-35 (Jan. 6, 2003) (complaining that Healy is under-represented).

Mr. Braun made it clear in his oral argument that the Borough is a unique place to live. He noted that it is a microcosm of Alaska. It has quite distinct communities with distinct characteristics – one community being largely military-service oriented, one being largely devoted to the mining industry, another largely oriented to tourism, several comprised largely of Alaska Natives, and also containing remote homes of homesteaders/trappers, etc.

The Borough Assembly is comprised of nine seats, which means each seat represents approximately 210 individuals of all ages (by number of households – approximately 85 families). The small number of residents in this area has resulted in a circumstance where even a small shift of an Assembly seat boundary will significantly alter the number of individuals represented by the seat. For example, moving six people from one district to an adjoining district in 2003, which was likely accomplished by only moving the boundary to omit or include a single residential driveway, resulted in a shift of the representation variance among Borough Assembly districts from 11.6% down to 9%.[5] In the 2000 Census, Anderson had a population of 367 and Healy had a population of approximately 1,000.[6] Mr. Braun claims that the composition of the Borough Assembly gives one community disproportionate clout in the Assembly.

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[5] Appellee's Brief at 6.

[6] Amended Complaint ¶¶ 28, 31; Answer to Amended Complaint ¶¶ 28, 31.

He asserts that given the configuration of districts, one-third of the Borough can control the decision on issues presented to the Borough.

On August 12, 2001, the Denali Borough Assembly declared that representation on the Assembly was malapportioned.[7] On October 14, 2001, the Denali Borough Assembly adopted Ordinance 01-12, which proposed a reapportionment of the Assembly.[8] The reapportionment plan provided for four districts:[9] the South District – which included Cantwell – had one seat; the Healy area was divided between the East Central District (with one seat) and the West Central District (with four seats); and the North District – which included Anderson and Clear – having three seats.[10] On February 19, 2002, the Denali Borough conducted a special election of all voters.[11] A majority of the voters approved the reapportionment ordinance passed by the Assembly.[12]

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[7] Amended Complaint ¶ 11; Answer to Amended Complaint ¶ 11.

[8] Amended Complaint ¶ 12; Answer to Amended Complaint ¶ 12.

[9] Amended Complaint ¶ 15; Answer to Amended Complaint ¶ 15.

[10] Motion to Determine Nature and Scope of Judicial Review, Exhs. A, B (March 10, 2003).

[11] Motion to Determine Nature and Scope of Judicial Review, Exh. C.

[12] Motion to Determine Nature and Scope of Judicial Review, Exh. D.

Following the election, Mr. Braun circulated a petition requesting a determination from the Commissioner of the Department of Community and Economic Development (DCED) on whether the reapportionment ordinance approved by the voters met the equal representation standards of AS 29.20.060.[13] He obtained the required fifty signatures, and on March 26, 2002, submitted the petition to the Commissioner of DCED, pursuant to AS 29.20.090(a).[14]

On May 9, 2002, Commissioner Sedwick issued a decision in a letter to Mr. Braun.[15] She determined that the reapportionment ordinance met the equal representation standards stated in AS 29.20.060 and complied with the Federal Voting Rights Act.[16] The Commissioner stated that a total population deviation between districts of 11.8% was "acceptable given the Borough's relatively small population and large

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[13] *See* Opposition to Motion for Dismissal of Open Meetings Act Claims, Exh. D.

[14] Opposition to Motion for Dismissal of Open Meetings Act Claims, Exh. D. The court notes that the petition was almost certainly filed with the commissioner past the 20 days deadline set by the legislature in AS 29.20.090(a). Because the commissioner accepted the petition without regard to its timeliness, and processed the appeal, the timeliness issue is not before the court in the present case. For the reasons set out in this decision, strict compliance with the legislatively-mandated appeal procedures should be applied, to promote the finality of election results. *Dale v. Greater Anchorage Area Borough*, 439 P.2d 790, 792 (Alaska 1968).

[15] Motion to Determine Nature & Scope of Judicial Review, Exh. D (letter from Sedwick to Braun, dated May 9, 2002).

[16] *Id.*

land area" and she found "no evidence to suggest that boundaries were created to orchestrate any particular outcome."[17]

On September 12, 2002, Mr. Braun's original complaint, filed *pro se* and dated August 28, 2002, was filed against the Denali Borough, DCED, and the Alaska Ombudsman's Office.[18] Braun then obtained counsel and on December 6, 2002, a stipulation to dismiss the two state agencies was filed. An amended complaint naming only the Denali Borough as defendant was filed on January 6, 2003.

The suit was converted into an appeal of the Commissioner's decision. In the meantime, the parties endeavored to obtain a political resolution of the dispute, and agreed to have as part of the 2004 general election, new apportionment proposals. The Borough modified the 2002 boundaries to move six individuals from one district to another, and thereby created districts which were within a 9% variance of the populations of the other districts. Mr. Braun submitted his own independent plan, and both plans were submitted to the voters in 2004.

The parties further stipulated that no further review of the 2002 reapportionment needed to be engaged in. Obviously, a new apportionment would moot the previous dispute, and it was agreed between

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[17] *Id.*

[18] Complaint is dated August 28, 2002.

the parties that the present case would not be revisited unless the 2004 reapportionment plan failed to pass constitutional review. The issue of attorney fees was reserved in the present case, but that issue was not pursued by motion by either party. A stipulation to dismiss the case, subject to the determination of the constitutionality of the 2004 apportionment, was filed.

Subsequent to dismissal, Mr. Braun filed suit challenging the upcoming 2004 election. That case was assigned to Judge Pengilly.

At the election, the voters adopted the Borough's plan. Following this, Mr. Braun sought review of the 2004 apportionment by the Commissioner of DCED. The Commissioner concluded that the 2004 apportionment was conditional. That decision has not been appealed. However, Mr. Braun filed a new suit, challenging the election process. That case was assigned to Judge Savell.

In the pre-election challenge, Judge Pengilly ruled that the challenge to the 2004 apportionment was premature, and suggested that any review of the 2004 apportionment plan should be handled by this court, on the principle that the parties had reserved review of the 2004 plan as a condition of the stipulation to dismiss in this case. The post-election challenge assigned to Judge Savell was dismissed as to all claims but one, and that did not concern the constitutionality of the 2004 apportionment scheme.

At Judge Pengilly's suggestion, the parties have now returned to this court. However, Mr. Braun challenges this court's jurisdiction to hear a challenge to the 2004 election. Essentially, although adoption of a properly constitutional apportionment plan was critical to the mooting of review of the 2002 plan, review of the 2004 plan had never been plead to, or assigned to, this court.

A controlling principle for the review of a borough reapportionment ordinance which has been approved by the electorate in accordance with a process established by the state legislature is that the "formulation of a reapportionment plan is a decidedly political process" and the courts should "not lightly interfere with the reapportionment process."[19] In *Dale v. Greater Anchorage Area Borough*, 439 P.2d 790 (Alaska 1968), the Alaska Supreme Court observed that the procedures for determining local election contests had been entrusted by he Alaska Constitution through Article V, §3, to the legislature.[20] The Alaska Constitution also assigned to the legislature the responsibility for providing the means for establishing boroughs.[21] Without the legislature prescribing by law the means for creating a borough, there is no borough. The ultimate decisions are then subjected to the vote of the citizens, not merely a borough

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[19] *Kentopp v. Anchorage*, 652 P.2d 453, 462 (Alaska 1982).

[20] *Dale*, 439 P.2d 790 at 791, *quoting Turkington v. City of Kachemak*, 380 P.2d 593, 596 (Alaska 1963).

[21] Alaska Constitution Article V, §3.

assembly. Accordingly, the courts approach this uniquely political setting with great consideration for the legislature's decisions as to process, as well as the citizenry's exercise of the ballot process.

The legislature, at AS 29.20.060-.120, prescribed the means for borough assembly apportionment. The legislature prescribed in those means an administrative review process for challenging an apportionment plan adopted by the voters.[22] Alaska Statute 29.20.090 provides for apportionment appeals to the commissioner of DCED:

> A reapportionment ordinance approved by the voters, or a decision of the assembly that the standards of AS 29.20.060 do not require a change in apportionment, may be appealed to the commissioner. Fifty voters may submit a petition to the commissioner requesting the commissioner to determine whether the proposed reapportionment ordinance approved by the voters meets the standards of AS 29.20.060. . . .[23]

If the commissioner determines that the reapportionment ordinance approved by the voters does not meet the standards in AS 29.20.060, the commissioner must order the assembly to prepare a reapportionment plan that meets such standards.[24] If a

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[22] AS 29.20.090(a), (b).

[23] AS 29.20.090(a).

[24] AS 29.20.090(c).

reapportionment ordinance meeting the standards of AS 29.20.060 is not approved by the voters within a specified period, the commissioner must prepare a reapportionment plan and deliver an order for such reapportionment to the borough mayor.[25] The commissioner may request the superior court to enforce such an order.[26]

Where administrative procedures are provided for contesting an election, those procedures are mandatory before seeking relief in the courts.[27] Moreover, strict compliance with the procedural requirements is necessitated by public policy, which demands that election results have finality.[28]

Alaska Statute 29.20.100(b) provides for "judicial review" of a reapportionment plan or ordinance approved by the voters under AS 29.20.080. Alaska Statute 29.20.200(b) states:

> (b) Each of the following is subject to judicial review:
>
> (1) a plan of reapportionment approved by the voters under AS 29.20.080(a);
>
> (2) a determination by the assembly under AS 29.20.080 that the standards of AS

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[25] AS 29.20.090(e).

[26] AS 29.20.100(a).

[27] *Dale*, 439 P.2d at 792.

[28] *Id.*

29.20.060 do not require a change in apportionment;

(3) a reapportionment ordinance approved by the voters under AS 29.20.080(d);

(4) a reapportionment order of the commissioner made under AS 29.20.090(c);

(5) a reapportionment ordinance approved by the voters under AS 29.20.090(d); and

(6) a reapportionment order of the commissioner made under AS 29.20.090(c).

The court is required to read together as a whole, statutes relating to the same subject matter in order that a total scheme evolves which maintains the integrity of each act and avoids ignoring one or the other.[29] The court must also give great deference to the administrative appeal remedy created by the legislature to resolve challenges in this area, which is the exclusive province of the legislature under the Alaska Constitution. Pursuant to the public policies discussed in *Dale*, the administrative remedy provided in AS 29.20.090(a) and (b) must be considered a mandatory first step in seeking review of borough reapportionment.[30] The mandatory use of the appeal process of AS 29.20.090(a) as a first step is consistent

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[29] *Hafling v. Inlandboatmen's Union*, 585 P.2d 870, 878 (Alaska 1978).

[30] *See Dale*, 439 P.2d at 792.

with the Alaska Supreme Court pronouncement that requiring the exhaustion of administrative remedies promotes "judicial efficiency by affording [the borough] an opportunity to correct its own errors, so as to render judicial action unnecessary."[31] Mr. Braun has utilized the review by the Commissioner of DCED for both the 2002 and the 2004 apportionment schemes. The Commissioner has concluded in each case that the schemes are constitutional. The appeal of the 2002 scheme (the present case) was dismissed by the parties. This court is unaware of any appeal from the Commissioner's decision as to 2004. It may be that the case that was before Judge Savell challenges the constitutionality of the 2004 apportionment scheme, and if so, it may be a vehicle to appeal the commissioner's determination. In any event, Mr. Braun is correct, and the present appeal as to the 2002 decision will not convey jurisdiction to review the Commissioner's decision as to the 2004 election. Accordingly, the present case remains DISMISSED, by stipulation of the parties.

However, so that there can be no misunderstanding, and so that further resources may not be wasted, if it is decided at some later date that this case is the proper vehicle for reviewing the Commissioner's decision as to the constitutionality of the 2004 election, the court also advises that in its view, the

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[31] *City of Fairbanks v. Rice*, 20 P.3d 1097, 1105 (Alaska 2000).

Commissioner's decision should be affirmed. The apportionment scheme is presumptively constitutional given the numbers of residents per seat on the assembly, and, while Mr. Braun feels his reasons for disputing the boundaries are compelling, the deference granted to the voters who adopted the scheme in the first place, and to the Commissioner who reviewed the scheme in the second place, would prevent the court from reversing the decision of the Commissioner. Accordingly, unless Mr. Braun is able to prevail on his challenge of the 2004 apportionment in other proceedings, this court is bound by the Commissioner's determination of constitutionality of the 2004 scheme, and this case remains DISMISSED.

The Borough is the nominal prevailing party because the challenge to the 2002 apportionment scheme has not been successful. The small modification in the 2004 scheme would not change this conclusion. However, Mr. Braun is a public interest litigant, and based upon the Alaska Supreme Court's recent holding in *Halloran v. State Div. Of Elections*,[32] no attorney's fees will be awarded against him in this action. All issues in this case have been addressed.

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[32] *Halloran v. State Div. Of Elections*, 115 P.3d 547, 552 (Alaska 2005).

DATED at Fairbanks, Alaska, this 15th day of May, 2006.

/s/ Randy M. Olsen
RANDY M. OLSEN
Superior Court Judge

I certify that on 5/25/06 copies of this form were sent to Braun James Gorski

/s/ DRL
Clerk

APPENDIX D

IN THE DISTRICT/SUPERIOR COURT
FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

David P Braun, Plaintiff vs. DENALI BOROUGH, Defendant.	Trial Court CASE NO: 4FA-02-02156CI Appeal CASE NO: S-12359/S-12050 **ORDER UPON CONCLUSION OF APPEAL**

The appellate court rendered its decision on 09/12/08 and returned jurisdiction to the trial court effective 10/24/08. Pursuant to that decision, the judgment/order of the trial court has been Reversed in Part, Remanded in Part, Affirmed in Part.

It is hereby ordered:

☐ Further proceedings will be held in _____, Alaska, before Judge _____ on _____, 20__, __.m.

☐ Counsel are directed to notice a hearing within _____ days of the date of this order before Judge _____.

☐ Defendant's conviction having been reversed on appeal, the judgment for costs of appointed counsel is vacated pursuant to Criminal Rule 39(c)(3)(B). Plaintiff is ordered to repay all sums paid in satisfaction of the

judgment, plus interest at the rate specified in AS 09.30.070(a).

☐ Other _____

☒ No further [trial /s/ RMO] proceedings are required. All exhibits and depositions filed in this case will be returned within 60 days or upon request. [A separate order will schedule a motion for attorney fees and costs. /s/ RMO]

12/09/08 /s/ Randy M. Olsen
Effective Date Judge

Randy M. Olsen
Type or Print Judge's Name

I certify that on _____
a copy of this order was sent to:

☒ Plaintiff's Attorney/Plaintiff: Braun

☒ Defense Counsel/Defendant: Gorski

☐ Prosecuting Authority's Collections Unit (If 3rd box is checked)

☐ Agency (if applicable):_____

Clerk: /s/ JO

APPENDIX E

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA FOURTH JUDICIAL DISTRICT AT FAIRBANKS

DAVID P. BRAUN,	)	
Plaintiff,	)	
v.	)	
DENALI BOROUGH,	)	
Defendant.	)	Case No. 4FA-02-2156CI

ORDER ON REMAND: ATTORNEY FEES

The Alaska Supreme Court has entered its ruling. Although as the trial judge I felt that the determination of constitutionality of the 2004 election was not in front of me, and I was only dealing with an appeal from a commissioner as to the 2002 plan, the Supreme Court has ruled otherwise. It appears from the decision of the Alaska Supreme Court that the judge that considered the 2004 scheme was not as important as getting the issue before them. Once placed squarely before the Alaska Supreme Court, they were able to deal with it. This court will now proceed according to the opinion of the Alaska Supreme Court.

Mr. Braun is entitled, under the catalyst theory, to apply for attorney fees and costs which had been generated in the case up to the point a new election was announced and I stayed the proceedings as to the

2002 election. Mr. Braun is given 30 days from the date of distribution of this order to file his motion for attorney fees and costs,

DATED at Fairbanks, Alaska, this 9th day of December, 2008.

/s/ Randy M. Olsen
RANDY M. OLSEN
Superior Court Judge

I certify that a copy of the foregoing
was distributed via:

MAIL:
(x) U.S. Postal Sve _____
( ) other _____

HAND DELIVERY
( ) Courier Sve _____
( ) Pick Up Bin _____
( ) Fax _____
(x) Other Clt _____

By: JB Date 12/16/08
Clerk

APPENDIX F

Order Regarding Fees and Costs

David P. Braun v. Denali Borough

Supreme Court No. **S-12359/S-12050**

Date of Order: **9/12/08**

Each party is to bear its own costs and attorney's fees in the supreme court in this matter.

Entered at the direction of an individual justice.

Clerk of the Supreme Court

/s/ Tiffany Muñoz
Tiffany Muñoz, Deputy Clerk

cc: Authoring Justice
Trial Court Appeals Clerk

Distribution:

James M. Gorski
Hughes Pfiffner Gorski Seedorf & Odsen
3900 C Street, Suite 1001
Anchorage AK 99503

David Braun
PO Box 222
Healy AK 99743

APPENDIX G

David P. Braun, Appellant, v. **Denali Borough**, Appellee.	Supreme Court No. **S-12359** **Order** Allow Supplemental Briefing Date of Order: **August 16, 2007**

Trial Court Case # **4FA-02-02156CI**

On consideration of the appellant's June 24, 2007 motion to supplement the record on appeal, and the appellee's August 1, 2007 opposition,

IT IS ORDERED: The P.L. 94-171 county block maps are already part of the record on appeal, appearing at **R. 836-38**. Moreover, on October 20, 2006, this court sua sponte consolidated for consideration and decision the appeals in S-12050 and S-12359. Because the briefing in S-12050 had been completed and the case argued, we stayed decision in that case to allow briefing in S-12359. Thus, exhibits 2A-2M and 3A will be considered as part of the record in both appeals.

The regional appeals clerk shall supplement the record with the documents listed in the motion.

Entered at the direction of an individual justice.

Clerk of the Appellate Courts

/s/ Ann Schroeder
Ann Schroeder, Deputy Clerk

cc: Regional Appeals Clerk

Distribution:

James M. Gorski
Hughes Bauman
Pfiffner, et al.
3900 C Street, Suite 1001
Anchorage AK 99503

David Braun
PO Box 222
Healy AK 99743

APPENDIX H

In the Supreme Court of the State of Alaska

David P. Braun, Appellant, v. **Denali Borough**, Appellee.	Supreme Court No. **S-12050** **Order** Allow Supplemental Briefing Date of Order: **10/20/06**

Trial Court Case # **4FA-04-02616CI**

On consideration of the appellant's 10/11/06 motion to consolidate cases S-12050 and S-12359, the 10/17/06 opposition,

IT IS ORDERED: based on the court's 10/20/06 order to consolidate, the motion is **MOOT**.

Entered at the direction of an individual justice.

Clerk of the Appellate Courts

/s/ Ann Schroeder
Ann Schroeder,
Deputy Clerk

Distribution:

James M. Gorski
Hughes Bauman Pfiffner, et al.
3900 C Street, Suite 1001
Anchorage AK 99503

David Braun
P O Box 222
Healy AK 99743

APPENDIX I

In the Supreme Court of the State of Alaska

David P. Braun, Appellant, v. **Denali Borough**, Appellee.	Supreme Court No. **S-12050** **Order** Date of Order: **10/20/2006**

Trial Court Case No. **4FA-04-02616CI**

Before: Fabe, Chief Justice, and Matthews, Eastaugh, and Bryner, Justices. [Carpeneti, Justice, not participating.]

IT IS HEREBY ORDERED that the above-captioned appeal is consolidated for decision with Braun's separate appeal in S-12359 for purposes of disposition. We **STAY** further proceedings in the above-captioned appeal pending briefing and disposition of the appeal in S-12359.

Furthermore, based on the court's duty to inform a pro se litigant of the procedural requirements necessary for obtaining relief apparently sought by the litigant,[1] appellant Braun is instructed that because Judge Olsen appears to have addressed the merits of Braun's constitutional challenge to the 2004

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[1] *See Genaro v. Municipality of Anchorage*, 76 P.3d 844, 846 (Alaska 2003); *Breck v. Ulmer*, 745 P.2d 66, 75 (Alaska 1987).

reapportionment scheme in its decision in 4FA-0202156,[2] Braun must move to amend his points on appeal in S-12359, pursuant to Appellate Rule 503, to add a challenge to that ruling if he wishes to preserve his right to appeal the superior court's decision upholding the 2004 reapportionment scheme.[3]

Entered at the direction of the court.

Clerk of the Appellate Courts
/s/ Ann Schroeder
Ann Schroeder,
Deputy Clerk

---

[2] In the superior court's decision in 4FA-02-02156, dismissing Braun's earlier lawsuit, it appears to have addressed the merits of Braun's constitutional challenge to the 2004 reapportionment scheme:

> [I]f it is decided at some later date that this case is the proper vehicle for reviewing the Commissioner's decision as to the constitutionality of the 2004 election, the court also advises that in its view, the Commissioner's decision should be affirmed. The apportionment scheme is presumptively constitutional given the number of residents per seat on the assembly, and, while Mr. Braun feels his reasons for disputing the boundaries are compelling, the deference granted to the voters who adopted the scheme in the first place, and to the Commissioner who reviewed the scheme in the second place, would prevent the court from reversing the decision of the Commissioner.

[3] If he elects to move to amend his points on appeal, appellant Braun is also free to request an extension of time within which to file his opening brief so that he may address the additional claim of error.

cc: Supreme Court Justices
Trial Court Appeals Clerk – Fairbanks

Distribution:

James M. Gorski
Hughes Bauman Pfiffner, et al.
3900 C Street, Suite 1001
Anchorage AK 99503

David Braun
P.O. Box 222
Healy AK 99743

APPENDIX J

IN THE SUPERIOR COURT FOR
THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

DAVID P. BRAUN, Appellant, vs. DENALI BOROUGH, Appellee.	Case No. 4FA-02-2156 Civil

JUDGMENT

This matter having come before the court as a lawsuit challenging the constitutionality of the Denali Borough's 2002 reapportionment ordinance, which was converted to an administrative appeal from the May 9, 2002 decision of the Commissioner of Commerce, Community and Economic Development; Deborah Sedwick. The constitutional issue was then mooted by the settlement of this lawsuit as discussed in the court's Memorandum Decision and Order of May 15, 2006. Having reviewed the briefing of the parties, and being otherwise fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff/appellant David P. Braun's complaints against the Denali Borough be and the same hereby are dismissed, with prejudice; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Denali Borough is the prevailing party. However, plaintiff/appellant David P. Braun is a public interest litigant, so there will be no award of costs or Civil Rule 82 attorney's fees to either party.

DATED at Fairbanks, Alaska, this 12 day of July 2006.

/s/ Randy M. Olsen
RANDY M. OLSEN
SUPERIOR COURT JUDGE

I hereby certify that a true and correct copy of the foregoing was mailed this 26 day of June, 2006 to:

David P. Braun
P.O. Box 222
Healy, AK 99743

I certify that on 7/13/06 copies of this form were sent to Braun Gorski

/s/ Patricia Brice

CLERK: DRL

APPENDIX K

IN THE SUPERIOR COURT FOR
THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

DAVID P. BRAUN,
Appellant,
v.
DENALI BOROUGH,
Appellee.

Case No. 4FA-02-2156 CI

ORDER OF CLARIFICATION

Mr. Braun has filed two motions for clarification, asking for instructions as to how he should proceed. The court is generally prohibited from telling any party, even one representing themselves, how to proceed, for several reasons. First, if a judge assisted one side, it would make him likely to favor that side, and then the system would not be impartial. Second, in almost every case, if several experienced attorneys were given the same case, each one would do things a little differently. If the judge were to give advice, the party would probably come back to complain about the advice. Instead, the party is asked to make their own decisions and arguments, and rely on the judge to fairly consider the case, without showing preference for either side.

The court can help by defining the issues that are being considered. The court is no longer dealing with the 2002 apportionment scheme. Any defects that might have been present at that time were altered by the 2004 election. The parties agreed that if the 2004 election provided for constitutional representation, all their conflicts would be resolved. Both parties were adamant that they were right as to their opinions about the 2002 apportionment. It had already been affirmed once by the Commissioner. The Borough agreed to fine tune it even more in the 2004 configuration, but denied the 2002 form was unconstitutional. Also, both sides said their positions would rise or fall on the constitutionality of the 2004 apportionment, reserving in this case the issue of any fees. The court has concluded by its own review that it will not consider attorney's fees separate from the constitutionality of the 2004 configuration. That is, if the 2004 configuration is constitutional, that will be the end of all questions in this case. If the 2004 configuration is unconstitutional, only then would the court consider a motion approving Mr. Braun's attorney's fees.

Accordingly, what is at issue now is whether the Commissioner's decision that the 2004 election apportionment was constitutional. All the arguments as to the correctness of the Commissioner's decision that the parties want the court to consider must be set out in the briefs due on March 31, 2006. Mr. Braun's style and page preparation is very good, and a "Brief of

Appellant" in the same style he has been using will be acceptable to the court.

Also, the recently filed "Motion for Declaration of Unconstitutionality of 2002 Apportionment and Dismissal" will not be addressed by the court. Only the briefs related to the legality of the 2004 election will be considered.

DATED at Fairbanks, Alaska, this 16th day of February, 2006.

/s/ Randy M. Olsen
RANDY M. OLSEN
Superior Court Judge

APPENDIX L

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

DAVID P. BRAUN Appellant, vs. DENALI BOROUGH, Appellee.	Case No. 4FA-02-2156 Civil

STIPULATED AGREEMENT AND ORDER TO STAY PROCEEDINGS AND CONTINGENT DISMISSAL

This Stipulation is entered into between Mr. David P. Braun, Appellant, and the Denali Borough, Appellee, to stay proceedings with the intention of resolving the dispute between the parties.

WHEREAS, Mr. David Braun has brought two actions against the Denali Borough, referenced *Braun v. Denali Borough*, Case No. 4FA-02-2156 Civil (Alaska, Fourth Judicial District), and *Braun v. Denali Borough*, Case No. 4FA-03-2607 Civil (Alaska, Fourth Judicial District), having common issues, and

WHEREAS, on May 7, 2004, the parties participated in a settlement conference respecting both cases, and reached agreed upon settlement terms for both cases, and

WHEREAS, the parties agree that one issue in the above appeal relates to whether the 11.9% variance between election districts contained within current Borough Assembly districting plan is constitutional; and

WHEREAS, the parties agree that a 10% or less variance is presumptively constitutional, and

WHEREAS, the parties wish to resolve the above captioned dispute without further litigation,

NOW, THEREFORE, the parties hereby stipulate as follows:

1. Counsel for the Borough, and the Borough Assembly members present at the settlement conference will recommend that the Denali Borough Assembly review the current Assembly apportionment plan in connection with the petition for review filed by certain residents of the Borough, including the Appellant, with a goal of bringing the plan deviation within the constitutionally presumptive standard of 10% or less.

2. Counsel for the Borough and the Borough Assembly members present at the settlement conference will recommend that if the Denali Borough Assembly puts forth for voter approval a new plan for Assembly apportionment then the Assembly shall also put forth to the voters a viable citizen generated plan with a plan deviation within the constitutionally presumptive standard of 10% or less.

3. If a new apportionment plan with a plan deviation within the constitutionally presumptive standard of 10% or less is approved by the voters, the Denali Borough agrees to review the school district boundaries and apportionment with public and school district input and that any proposed changes will be put to the voters at the next scheduled election.

4. Any new apportionment plan approved by the voters will be subject to U.S. Department of Justice review under Section 5 of the Voter's Rights Act.

5. The appeal in this case shall be stayed pending voter decision of assembly apportionment in accordance with these terms.

6. Upon approval by the voters of a constitutionally acceptable apportionment plan, the above appeal shall be dismissed.

7. The parties reserve for future litigation costs and attorney fees.

MICHAEL J. WALLERI
Attorney for David P. Braun

5-21-04
Date

By: /s/ Michael J. Walleri
Michael J. Walleri
ABA No. 7906060

HUGHES THORSNESS POWELL
HUDDLESTON & BAUMAN LLC
Attorneys for Denali Borough

5-21-04
Date

By: /s/ James M. Gorski
James M. Gorski
ABA No. 7710123

ORDER

IT IS SO ORDERED.

DATED this ___ day of _____, 2004.

/s/ _____
RANDY M. OLSEN
SUPERIOR COURT JUDGE

APPENDIX M

In the Supreme Court of the State of Alaska

David P. Braun, Appellant, v. **Denali Borough,** Appellee.	Supreme Court No. **S-12050/12359** **Order** Petition for Rehearing Motion for Reconsideration Date of Order: **10/24/08**

Trial Court Case # **4FA-04-02616CI/4FA-02-02156CI**

Before: Fabe, Chief Justice, and Matthews, Eastaugh, Carpeneti, and Winfree, Justices

On consideration of appellant's Petition for Rehearing filed on **9/17/08** and Motion for Reconsideration filed on **9/18/08**,

IT IS ORDERED:

1. The Petition for Rehearing is DENIED.

2. The Motion for Reconsideration of the order requiring the parties to bear their own costs and fees is also DENIED. The order of 9/12/08 relates only to attorney's fees and costs on appeal, and does not affect this court's holding that appellant will be entitled to request fees under the catalyst theory once the case has been remanded to the superior court.

Entered by the direction of the court.

Clerk of the Appellate Courts

/s/ Marilyn May
Marilyn May

cc: Supreme Court Justices
Judge Olsen/Judge Pengilly
Trial Court Appeals Clerk
Publishers (Opinion #6305, 9/12/08)

APPENDIX N

Tony Knowles, Governor

Alaska Department of Community and Economic Development

Division of Community and Business Development
550 W. 7th Avenue, Suite 1770, Anchorage, AK 99501-3510
Telephone: (907) 269-4580 – Fax: (907) 269-4539 – Text Telephone: (907) 465-5437
Email: questions@dced.state.ak.us – Website: www.dced.state.ak.us/cbd/

August 17, 2001

The Honorable Johnny Gonzales
Mayor
Denali Borough
P.O. Box 480
Healy, Alaska 99743

Dear Mayor Gonzales:

RE: Borough Reapportionment

Residents of the Denali Borough recently contacted Division staff concerning the Borough's reapportionment efforts. The specific concerns relate to the calculation of the variance of the current apportionment scheme and to the time requirements of State Statute to address malapportionment and to place the reapportionment question on the municipal ballot in November.

Variance calculation

Division staff prepared the following variance analysis of the current apportionment scheme:

DISTRICT VARIANCE	2000 Pop	# Seats	Pop/Seat	Variance
District 1 (Cantwell)	222	1	222	+5.7%
District 2 (McKinley, Ferry, Healy South)	1,095	4	274	+30.4%
District 3 (Healy North, Anderson, Clear)	576	4	144	-31.4%
	1,893	9	210	61.8%
		seats	avg.	

Since the assembly adopted a resolution on August 12, 2001, declaring itself malapportioned, the next step is to identify options to present to the voters at the municipal election in November.

One possible alternative apportionment plan is presented below. It would not require the changing of district boundaries.

DCED STAFF OPTION – move seat from #3 to #2	2000 Pop	# Seats	Pop/Seat	Variance
District 1 (Cantwell)	222	1	222	+5.7%
District 2 (McKinley, Ferry, Healy South)	1,095	5	219	+4.3%
District 3 (Healy North, Anderson, Clear)	576	3	192	-8.6%
	1,893	9	210	14.3%
		seats	avg.	

While this is still somewhat higher than the 10% ideal, it would be a viable option for the U.S. Department of Justice to review.

Malapportionment Determination

According to AS29.20.080(a), the Borough had two months after adoption of a final state redistricting plan to determine and declare, by resolution, whether or not the existing assembly apportionment meets the standards of AS29.20.060 (equal representation). The final State redistricting plan was adopted June 18, 2001. Therefore, the Denali Borough assembly acted within the prescribed time frame.

The reapportionment option(s) must be submitted to the voters at the next regular election or at a special election called for the purpose. Failure to do so may

result in a voter petition, legal action by residents, and/or involvement by this Department.

Please feel free to contact me should you have questions, require more information, or would like assistance in this matter.

Sincerely,

/s/ Patrick K. Poland
Patrick K. Poland
Director

cc: David Braun
Teresa Chepoda Usibelli

APPENDIX O

Tony Knowles, Governor

Alaska Department of Community and Economic Development

Office of the Commissioner
P.O. Box 110800, Juneau, AK 99811-0800
Telephone: (907) 465-2500 – Fax: (907) 465-5442 –
TDD: (907) 465-5437
Email: questions@dced.state.ak.us –
Website: www.dced.state.ak.us/

January 10, 2002

Mr. David P. Braun
P.O. Box 222
Healy, Alaska 99742

Dear Mr. Braun:

Governor Knowles asked me to respond to your letter concerning the actions of the Denali Borough Assembly (DBA). The interest of local residents is a key ingredient in effective local government, so we appreciate hearing from you.

The concerns you raise touch on three major issues:

Assembly reapportionment;
The state's regulatory authority concerning municipalities; and
The Open Meetings Act and public records.

Assembly Reapportionment

Alaska Statutes 29.20.060 to 29.20.100 apply to the composition and reapportionment of borough assemblies. However, AS 29.20.080 to 29.20.110, are not

applicable to home rule boroughs if the home rule charter provides for reapportionment (AS 29.20.120).

The Denali Borough Home Rule Charter addresses reapportionment in the following statement (Article II, Section 2.02):

> "As the need arises, re-apportionment and redistricting changes will take place by Assembly ordinance."

In consultation with Alaska's Attorney General, the Division of Community and Business Development (DCBD) determined, and the Denali Borough agreed, this statement is insufficient to meet the requirements of AS 29.20.120. As a result, the DBA has been following the provisions of AS 29.20.100 in its reapportionment process.

The reapportionment process has several deadlines of importance:

- *Date of adoption of a final state redistricting plan under Article VI, Section 10 of the Alaska Constitution.* This state plan was adopted on June 12, 2001;
- *Declaration of malapportionment by assembly resolution.* The DBA adopted a resolution declaring itself malapportioned on August 12, 2001;
- *Adoption by the voters of a reapportionment ordinance.* A special election is scheduled for the Denali Borough for February 19, 2002, to vote on reapportionment options; and

- *U.S. Department of Justice (DOJ) preclearance of the reapportionment ordinance adopted by the voters.* Preclearance must be obtained prior to implementation of the ordinance. After the special election has been certified, the reapportionment ordinance adopted will be submitted to DOJ for review; DOJ requires 60 days for their review.

At its December 9, 2001, DBA meeting, the DBA set February 19, 2002, as the special election date for reapportionment issues. The reapportionment ordinance adopted, with a variance of 11.9%, will appear on the ballot for voter approval. After the December 9 DBA meeting, an at-large initiative petition was certified and will also appear on the ballot for voter approval.

The February 19 date is one week past the six month time frame specified in AS 29.20.080(e). Because the Borough is making a good faith effort, the state will not interfere with the Borough's process at this time.

The 11.9% variance is above the upper ideal of 10%. However, since the DOJ has precleared variances as high as 32.3%, the 11.9% variance is low enough to submit to DOJ for preclearance.

States Regulatory Authority

In Article X, Section 1, the Alaska Constitution states:

> "The purpose of this article is to provide for maximum local self government with a minimum of local government units, . . . "

Article X, Section 14 establishes a local government agency (presently, the DCBD) to do the following:

> advise and assist local governments;
> review local government activities;
> collect and publish local government information; and
> perform other duties as prescribed by law.

This Constitutional mandate does not confer broad regulatory authority upon DCBD. DCBD has only the regulatory powers specifically conferred on a limited basis by Alaska Statute.

Borough reapportionment is one area that DCBD has limited regulatory powers. At the request of the Denali Borough, DCBD staff has been advising and assisting with the reapportionment issue only in its "advise and assist" role. In the present situation with the Denali Borough reapportionment efforts, DCBD will be able to exercise those regulatory powers only if the Denali Borough voters fail to adopt a reapportionment plan on February 19, 2002, or if a plan is adopted and fails to receive preclearance from DOJ.

Open Meetings Act and Public Records

DCBD has no regulatory powers to compel the DBA or staff to act or not act. The Borough's municipal attorney advises them on matters of law. The only recourse open to you in these matters is to retain legal counsel on your behalf.

Hopefully, this information offers new perspectives and a better understanding of local government, municipal reapportionment, and the State's limited regulatory authority concerning municipal reapportionment. Should you have further questions concerning this matter, please contact Midge Clouse, DCBD staff working with the Denali Borough on reapportionment issues. Ms. Clouse can be reached at (907) 269-4587.

Sincerely,

/s/ Deborah B. Sedwick
Deborah B. Sedwick
Commissioner

cc: Governor Tony Knowles
The Honorable Johnny Gonzales,
Mayor, Denali Borough

APPENDIX P

Tony Knowles, Governor

Alaska Department of Community and Economic Development

Office of the Commissioner
550 W. 7th Avenue, Suite 1770 –
Anchorage, Alaska 99501-3510
Telephone: (907) 269-8100 – Fax: (907) 269-8127
Website: www.dced.state.ak.us

May 9, 2002

Mr. David Braun
Box 222
Healy, Alaska 99743

Dear Mr. Braun:

RE: Denali Borough Reapportionment Appeal

A petition, pursuant to AS 29.20.020 and signed by more than 50 Denali Borough voters, was received in my office on March 26, 2002. The petition requested a review of the Denali Borough reapportionment ordinance to determine if it met the equal representation standards of AS 29.20.060.

I have had staff thoroughly review the reapportionment ordinance adopted by the Denali Borough as well as the process used to adopt it. Staff has also consulted with the Attorney General's office regarding the reapportionment ordinance. Based on that review and consultation, I have determined that the reapportionment ordinance adopted by the Denali Borough meets the equal representation standards of AS 29.20.060.

The following issues were addressed during this review:

Process

The Denali Borough Assembly considered a number of reapportionment options. These options were presented at legally constituted meetings of the Assembly and public testimony was taken concerning them. After due consideration the Assembly properly adopted an option to be presented to the voters. At approximately the same time, a group of Borough voters used the initiative process to propose election of assembly members on an at-large basis.

A special election was conducted in February 2002, at which both options were presented to borough voters. The option proposed by the Assembly was ratified by a majority of the Borough's voters, while the at-large election proposal failed to receive majority approval.

Districts

The districts follow naturally occurring geographic boundaries and contain a relatively compact and homogeneous population. The total population deviation between districts is 11.8%, which is acceptable given the Borough's relatively small population and large land area. There is no evidence to suggest that boundaries were created to orchestrate any particular outcome.

Federal Voting Rights Act and Minority Representation

The apportionment scheme of a Borough Assembly must comply with the Federal Voting Rights Act (FVRA). In administering the FVRA the standard of review used by the U.S. Department of Justice is that the " . . . proposed redistricting plan must not have the purpose or effect of worsening the position of minority voters . . . " when compared to the Borough's "benchmark" plan. The "benchmark" plan is the most recent apportionment plan to have received USDOJ approval.

The districts as drawn in the adopted option maintain the Assembly seat for the Cantwell district. Cantwell has the largest concentration of Alaska Natives in the Borough. This allows the Native population of the Borough the opportunity to retain its representation on the Assembly. The adopted option received strong approval from the Cantwell district's voters.

Based on this review, I have determined that the Assembly apportionment ordinance adopted by the Denali Borough meets the equal representation standards of AS 29.20.060.

Sincerely,

/s/ Deborah B. Sedwick
Deborah B. Sedwick
Commissioner

cc: The Honorable Johnny Gonzales,
Mayor, Denali Borough
Midge Clouse, Local Government Specialist,
DCED, Anchorage
Irene Catalone, Local Government Specialist,
DCED, Fairbanks

APPENDIX Q

[LOGO] State of Alaska
Ombudsman

Reply to:

☐ P.O. Box 102036
Anchorage, AK 99510-2036
(907) 269-5290
(800) 470-2024
(FAX) 269-5291

☒ P.O. Box 113000
Juneau, AK 99811-3000
(907) 465-4970
(800) 470-4970
(FAX) 465-3330

August 6, 2002

Mr. David P. Braun
PO Box 222
Healy, Alaska 99743

RE: Ombudsman Complaint J2002-0151 (Closed)

Dear Mr. Braun:

I am writing in response your complaint dated June 16, 2002, in which you alleged that the Department of Community and Economic Development (DCED) failed to carry out its statutory duty to review the apportionment of the Denali Borough. As you are aware from our phone conversation on July 26, I am declining to further investigate your complaint. In this letter, I will lay out my reasons as clearly as possible.

DCED's only authority to intervene in the borough's apportionment is provided by Alaska Statute 29.20.090. This statute gives DCED the power to review an apportionment plan after fifty voters petition the commissioner of DCED "to determine whether the proposed reapportionment ordinance approved by the voters meets the standards of AS 29.20.060." AS 29.20.060(a) provides that "Assembly composition and apportionment shall be consistent with the equal representation standards of the Constitution of the United States." In other words, DCED has been empowered to overrule a borough's assembly apportionment, but only if the apportionment is so flawed that it is unconstitutional. Even if the commissioner of DCED finds the apportionment plan unconstitutional, DCED cannot necessarily create a new apportionment plan. AS 29.20.090(c) requires DCED to direct the borough assembly to prepare a new plan and submit it to the voters. (DCED will create all apportionment plan only if the assembly fails comply with AS 29.20.090(c)).

You complaint concerns the apportionment proposed by Denali Borough Ordinance 01-12 and adopted at a special election held February 19, 2002. DCED received a petition to review the apportionment, and commissioner of DCED issued a decision May 9, 2002 upholding the borough apportionment.

You pointed out that the borough apportionment has a comparative variance of 11.9%, and that federal law and Alaska law state that the maximum variance should be under 10%. I have reviewed the Alaska

Supreme Court opinions on this issue. A maximum comparative variance under 10% is considered minimal and need not be justified. A larger variance should be justified. The Denali Borough has not, as far as I can determine, provided an explanation for the 11.9% variance. My own review of the census block populations and the variances for each district revealed that most of 11.9% comparative variance is due to the 8.6% variance for the southern (Cantwell) district. Moving six people from the Cantwell district to one of the central districts would have reduced the comparative variance below ten percent. In short, the number of people needed to affect the variance is tiny, and probably within the margin of error for calculating the population of each district, given that census figures are not absolutely correct (especially two years after the census). I can therefore understand DCED's reluctance to intervene based on the 11.9% variance.

You also alleged that the assembly district boundaries have been drawn in a way that disenfranchises voters in Ferry and other areas between Healy and Anderson. You allege that these voters share interests with the Healy population, and have little in common with the population of the incorporated City of Anderson. In the new northern district, which has three seats on the nine-member assembly, the Anderson residents are a clear majority. You allege that this boundary was drawn specifically to dilute the voting power of the Healy area voters and to enhance the Anderson residents' voting power by making

them the majority in a three-seat district, even though Anderson's population, standing alone, could not otherwise control more than two seats.

Essentially, you are claiming that the northern district boundary is unconstitutional. With all due respect, I have been unable to find court cases or other law to establish that it is unconstitutional to assign members of unincorporated areas within a borough to one local election district or another. The population of Ferry and the other areas between Panguingue Creek and Sled Road/Rex Trail is not part of an incorporated community of Healy. Nor are they part of a defined racial or ethnic block. The fact that many of voters in question use the Healy school and work in Healy does not mean that they are constitutionally entitled to be in same election district. So far, you have provided evidence of that the apportionment plan may be poor policy, but that does not necessarily make it a constitutional issue. Regardless of my personal opinion of the apportionment plan, I cannot conclude that DCED was required to overturn the apportionment.

As a side note, you need not wait until after the 2010 census to seek another apportionment of the Denali Borough. Under Alaska law, a borough may reapportion at any time. The assembly may pass a new apportionment ordinance and submit it to the voters pursuant to AS 29.20.060(b). The assembly need not declare the old plan unconstitutional in order to propose a new one. Alternatively, under AS 29.20.080(c), fifty or more voters may petition the

assembly to make a finding of malapportionment, and to provide a new plan.

You have also alleged that assembly Member Jim Caswell is not actually a resident of the Denali borough, and therefore should have forfeited his assembly seat. As far as I can determine, DCED's authority to review an apportionment plan does not include any authority to investigate the residency qualifications of your assembly members. However, you may wish to contact the Division of Elections (907-465-4611) regarding the validity of Mr. Caswell's voter registration.

Your complaint is now closed, but thank you for bringing this issue to our attention.

Sincerely,

/s/ Beth Leibowitz
Beth Leibowitz
Assistant Ombudsman

APPENDIX R

[LOGO] State of Alaska
Ombudsman

Reply to:

☐ P.O. Box 102036
Anchorage, AK 99510-2036
(907) 269-5290
(800) 470-2024
(FAX) 269-5291

☒ P.O. Box 113000
Juneau, AK 99811-3000
(907) 465-4970
(800) 478-4970
(FAX) 465-3330

August 8, 2002

Mr. Pat Poland, Director
Division of Community and
Business Development
Department of Community and
Economic Development
550 W. 7th Ave., Suite 1770
Anchorage, Alaska 99501-3510

FACSIMILE: (907) 269-4539

RE: Ombudsman Complaint A2002-0151

Dear Mr. Poland:

I spoke with you on July 18, 2002, while reviewing a complaint by Mr. David Braun, and I promised to provide you with a written evaluation of the issues he raised. Mr. Braun alleged that DCED had not

adequately carried out its statutory oversight duties regarding the Denali Borough reapportionment. The borough was required to reapportion its assembly districts, because the 2000 census indicated that the districts were seriously malapportioned. The borough needed to reallocate assembly seats and/or redraw the district boundaries.

DCED has had two roles in working with the Denali Borough. First, DCED acted in its "advise and assist" capacity to provide non-binding advice to the borough government during the reapportionment. This included the August 17, 2001, letter to the borough mayor explaining that the borough must reapportion its election districts, as required by Alaska Statutes, and offering a possible reapportionment option. Second, DCED received a citizen petition pursuant to AS 29.20.090, requesting DCED to review the voter-approved apportionment plan for compliance with AS 29.20.060. The standard set forth in AS 29.20.060(a) requires that "Assembly composition and apportionment shall be consistent with the equal representation standards of the Constitution of the United States." In my review of Mr. Braun's complaint, I concentrated on DCED's appeal decision because that is the point at which DCED had authority to make a binding decision.

I recognize that your agency was required to make a difficult decision in this case, and that flaws in the apportionment plan had to be balanced against the cost of overturning a voter-approved plan and requiring the borough to produce a new plan and

place it on the ballot. However, several aspects of DCED's review disturbed me, and I would like to explain what I found so that your department may consider these issues in future decisions.

First, one of the few clear rules in apportionment cases is that a comparative variance over ten percent must be justified. According to the Alaska Supreme Court in *Kentopp v. Anchorage*, 652 P.2d 453 (Alaska 1982), a comparative variance under 10% is considered *de minimis* and is presumed valid, "but variations in excess of ten percent are unlawful unless the government body justifies the malapportionment." In *Kentopp*, the court specifically remanded the case with instructions that Anchorage must justify a maximum comparative variance of 11.9%. The problem in the present case is that I have seen no evidence that the Denali Borough attempted to justify the 11.9% variance in its plan.

The fact that the federal Department of Justice (DOJ) often accepts larger variances does not justify similar acceptance by DCED. My understanding is that DOJ's role is limited to reviewing the apportionment for signs that it lessens the voting power of a racial minority. DCED's review authority is clearly broader than DOJ's; your agency is directed to protect the constitutional right to "equal representation" for all voters. I gained the impression from discussions with Midge Clouse and yourself that DCED routinely accepts comparative variances higher than 10%, a practice which seems inconsistent with existing Alaska court cases. This practice is also reflected in

your August 2001 letter to the Denali Borough's mayor, in which you suggested that a plan with a 14% variance would be reasonable, since DOJ would accept it.

On its face, DCED's acceptance of the variance, without explanation by the borough, appears unjustified. However, this decision is made more understandable by the fact that the variance in Denali Borough could have been brought below ten percent by moving as few as six residents from the southern (Cantwell) district to one of the central districts. In short, the number of people needed to affect the variance is small, and probably within the margin of error for calculating the population of each district, given that census figures are not absolutely correct. I can therefore understand DCED's reluctance to intervene based on the 11.9% variance.

The second problem is that equal representation requires not only equally weighted votes (low variance), but also protection of "*fair and effective representation*." The Alaska Supreme Court, in *Kenai Peninsula, Bor. v. State*, 743 P.2d 1352, 1371 (Alaska 1987), explained this requirement as follows:

> The constitutional interest allegedly impaired here is not the right to vote per se, but the interest of individual members of a geographic group or community in having their votes protected from disproportionate dilution by the votes of another geographic group or community.

Once again, the Department of Justice looks after the interests of racial minority voting groups, but the constitutional requirement is broader than DOJ's interests, and therefore DCED's interest must be broader as well. The issue of vote dilution is the heart of Mr. Braun's complaint about the Denali Borough apportionment. He alleges that the residents of Ferry and the areas north of Healy have been made a minority in the northern district, which is composed mostly of the City of Anderson, and that this was done deliberately to dilute the voting power of the Healy area.

I am troubled by the conclusion in the commissioner's decision letter of May 9, 2002, that "[t]here is no evidence to suggest that the boundaries were created to orchestrate any particular outcome." My review of this case, including interviews with the complainant and assembly member Jeremy Pollock, leads me to conclude that there is evidence – not proof, but evidence – that the district lines were drawn for the specific purpose of preserving three assembly seats for the Anderson/Clear district. The City of Anderson and the census blocks touching it would, standing alone, qualify for only two seats. The question is whether expanding the "north" (Anderson) district boundary southward to increase its population was illegitimate vote dilution of a cohesive group (Healy area voters), or whether this decision was simply an acceptable political compromise. By refusing to acknowledge the issue in its decision, DCED

unintentionally gave the impression that it did not carefully review the matter.

In fact, after interviewing both you and Midge Clouse, I believe that DCED did consider this problem. I am also aware that you consulted with Marjorie Vandor, an assistant attorney general assigned to your department, and that she did not see any constitutional implications in Denali Borough's district lines. I believe that the issue raised by Mr. Braun is a serious one, but my review of existing law indicates that his allegations do not necessarily establish a constitutional violation.

In *Kenai Peninsula Borough*, the court concluded it was unconstitutional to place a small portion of the municipality of Anchorage in a more rural senate district in order to prevent another "Anchorage senate seat." This conclusion relied on the Alaska Constitution's equal protection clause rather than the federal equal protection clause referenced in AS 29.20.060. When applying the Alaska equal protection clause, our courts require less proof of intentional vote dilution than would a federal court analyzing the same claim under the federal equal protection clause. Although AS 29.20.060 references only the "equal representation standards of the Constitution of the United States," I do not see how either the Denali Borough or DCED could avoid the Alaska Constitution's equal protection clause (Ak. Const. Art. I, section 1). In short, it is illegal to place part of a municipality into a district where the municipality's voters will be a minority, when the

division is done specifically to reduce the municipality's legislative power.

However, Mr. Braun is not complaining about the breaking up of a municipality. He is complaining about the division of unincorporated portions of a single borough. In the recent legislative redistricting decision issued by the Alaska Supreme Court, the court ruled that it was acceptable to divide Delta Junction (an unincorporated community) between two separate legislative districts. The court stated, "Further, dividing an unorganized area such as the Delta Junction area, does not, without more, constitute sufficient evidence of an equal protection violation such that the board must justify its action." *See In re 2001 Redistricting Cases*, 44 P.3d 141, 145 (Alaska 2002). In other words, it is not clear whether Mr. Braun's claim that the Healy-Ferry area is discrete geographical constituency – one capable of suffering vote dilution – is a claim that would succeed in state court. In conclusion, I cannot say that DCED's decision of May 9, in which DCED upheld the borough's reapportionment plan, was clearly wrong, despite the plausible constitutional issue raised by Mr. Braun.

Last but not least, I am concerned by the inaccuracies in the information provided by the Denali Borough and accepted by DCED. I compared Denali Borough Ordinance 01-12, which set forth the district boundaries adopted in the special election, to the table of census blocks per district provided to DCED by the borough. The narrative description in the

ordinance is inconsistent with the census blocks assigned to the districts:

- Ordinance 01-12 uses the Nenana River as the boundary between the "west central" and "east central" districts. However census block 2038 (population 3 people) is assigned to the east central district despite being on the west side of the Nenana River. This contradicts the ordinance language.

- Ordinance 01-12 uses Panguingue Creek as the boundary between the "north" and "west central" districts, but census blocks 2030, 2031, 2032, and 2033 (all *north* of Panguingue Crk.) are still assigned to the west central district. None of these census blocks is currently inhabited, but the visual discrepancy on the map is startling, to the say the least.

Also, while not clearly inconsistent, the ordinance describes the "east central" district as including "McKinley Village/Carlo Creek." The borough assigned several census blocks south of Carlo Creek to the east central district (census blocks 2111, 2112, 2113, 2117, 2118, 2119), so that the actual district boundary appears to be Slime Creek. The actual boundary is difficult to discern from the language of the ordinance, and the voter information map distributed by the borough is not especially helpful (the voter information map refers to "south of Carlo Creek" as part of the south district, leaving it unclear whether the boundary is Carlo Creek itself, or some

point just south of Carlo Creek). The ambiguity affects 14 people – a large number for the Denali Borough.

These discrepancies do not, contrary to Mr. Braun's contentions, prove bad faith on part of the borough. But this imprecision does make it considerably more difficult to conclusively rebut the complainant's charges. If the borough itself cannot be clear about the election district boundaries, then obtaining the informed consent of the electorate appears nearly impossible. In both its "advise and assist" role and in review of the appeal, DCED appears not to have caught these problems. It is appropriate for DCED to advise and insist (through the potential enforcement mechanism provided by AS 29.20.090) that borough governments back up their apportionment plans with accurate, readily available information. Failure to insist on clarity makes it extremely difficult to assure the public that reapportionment has been done in good faith. It also leads to the appearance that DCED condones this kind of sloppiness.

In conclusion, I have two main concerns with DCED's review of the apportionment plan. First, DCED appears to have relied heavily on the DOJ preclearance, which simply does not fulfill all of DCED's statutory requirements per AS 29.20.060 and 29.20.090. Second, DCED appears to have been exceedingly deferential to local "self-determination" during both its advisory role and its statutory review. AS 29.20.090 exists precisely to place a limit on local

self-determination. I believe it would have been appropriate for DCED to insist upon better, more precise information on the district boundary lines, and to expect the borough to provide justification for the 11.9% variance. But despite these concerns, I cannot say that the department's decision was wrong under the circumstances. Therefore, I have declined to further investigate Mr. Braun's complaint.

This was a close case in many ways, and I would like to thank you, Midge Clouse, and Laura Walters for your candor and time while I reviewed the complaint. I also appreciate your efforts in a difficult job, because I am aware the reapportionment disputes are usually not easy to resolve.

Sincerely,

/s/ Beth Leibowitz
Beth Leibowitz
Assistant Ombudsman

Cc: Midge Clouse, Legal Government Specialist IV, DCED

APPENDIX S

DENALI BOROUGH, ALASKA

RESOLUTION 04-06

A RESOLUTION OF THE DENALI BOROUGH ASSEMBLY TO REVIEW THE CURRENT APPORTIONMENT OF PLAN AS REQUESTED BY A PETITION OF THE PEOPLE OF THE DENALI BOROUGH.

WHEREAS, the Denali Borough Assembly received a petition on April 6, 2004 regarding the Borough's current apportionment; and

WHEREAS, the petitioner's requested a review of the existing apportionment plan to determine whether the apportionment meets the standards of AS 29.20.060; and

WHEREAS, pursuant to AS 29.20.060, the composition and apportionment of the Denali Borough Assembly is required to be consistent with the equal representation standards of the Constitution of the United States; and

WHEREAS, according to AS 29.20.060 the Assembly does not provide for weighted voting; and

WHEREAS, the 2000 decennial census has been completed and the results provided to the Borough Assembly to determine the apportionment of the Borough.

NOW THEREFORE BE IT RESOLVED: that the Denali Borough Assembly agrees to review the current apportionment plan with a goal of bringing the plan deviation within the constitutionally presumptive standards of 10% or less; and

BE IT FURTHER RESOLVED: the Denali Borough Assembly apportionment plan will meet the standards of AS 29.20.060.

PASSED and APPROVED this 12th day of May, 2004.

ATTEST: [The Official Seal of the Denali Borough] /s/ David M. Talerico
Mayor

/s/ Gail Pieknik
Borough Clerk

APPENDIX T

DENALI BOROUGH CERTIFICATE OF ELECTION – BALLOT PROPOSITION (Form K)

THIS IS TO CERTIFY that on the 2nd day of November, 2004, the ballot proposition relating to *Ordinance 04-11. Ordinance 04-11 Reapportions the existing four election districts to follow the US Census 2000 block boundaries, and in doing so moves six people from the south district: three (3) being counted in the East Central District and three (3) being counted in the West Central District. Except as modified by the election districts and the election procedures remain unchanged.*

A true and correct copy of which is attached hereto, was approved by the voters of the Denali Borough, as confirmed by the Borough Assembly of the Denali Borough, upon completion of the final canvass of ballots on the 5th day of November, 2004.

DATED at the Borough offices in Healy, Alaska, this 5th day of November, 2004.

/s/ David M. Talerico
Mayor

ATTEST:

[The Official Seal of the Denali Borough]

/s/ Gail Pieknik
Borough Clerk

APPENDIX U

David P. Braun
Box 222
Healy AK 99743
907-683-2654

**IN THE SUPREME COURT
OF THE STATE OF ALASKA**

David P Braun, Appellant, Plaintiff v. **Denali Borough,** Appellee, Defendant	**Consolidated Supreme Court Cases S-12050CI and S-12359CI** **Affidavit of Appellant**

TRIAL COURT CASES 4FA-04-2616CI and 4FA-02-2156CI respectively

Affidavit of Appellant Supporting Notice of Ex Parte Proceedings and Other Violations of Rules of Procedure Prejudicial to Appellant

I, David P Braun, state as follows:

1) I am the appellant in S-12359, Trial Court Case 4FA-02-2156CI,

2) Oral Argument in 4FA-02-2156CI was completed May 5, 2006

3) The purpose of this affidavit is to support facts relating to the *NOTICE OF EX PARTE PROCEEDINGS, AND OTHER VIOLATIONS OF THE RULES OF APPELLATE PROCEDURE*

PREJUDICIAL TO APPELLANT where the facts relating to the above notice have not been otherwise proved; specifically it is a chronological record of some telephone conversations with clerks of the Alaska Court System relating to matters in the above notice.

4) In late fall/early winter of 2006 Roberta, a clerk identifying herself as being on Judge Olsen's staff in Fairbanks, telephoned me and said she wanted to return the P.l. 94-171 County Block Maps for Denali Borough and told me to call her before I arrived at the Rabinowitz courthouse and she would arrange to have the maps "downstairs" for me to retrieve.

5) On or about January 24, 2007 Roberta telephoned me and said that she was going to "throw [the maps] out" if I did not come to get them.

6) On January 31, 2007 in another phone conversation with Roberta I told her that she must not destroy the maps as they were: 1) my property, and 2) they were evidence in these consolidated appeals as they had been presented in Oral Argument before Judge Olsen. Roberta said they would look into the matter and on or about February 6, 2007 I received an order [on file in this court] stating that "the maps" were entered into the superior court file.

7) On Friday January 4, 2008 I called Alaska Supreme Court Chief Deputy Clerk Lori Wade to ask about the status of S-17359. Lori wade told me that Denali Borough Attorney James Gorski had filed his *Opposition* to my December 20, 2007 *Motion for Supplemental Exhibits* ***3B-3H*** on

January 2, 2008. I said I had not yet received it, and pointed out that the post office was open on December 31, 2007 and that Mr. Gorski's Opposition was therefore filed late.

8) On Sunday January 6, 2008 I checked my mailbox and found Mr. Gorski's *Opposition* to my December 20, 2007 *Motion for Supplemental Exhibits* ***3B-3H***, but there was no motion to accept late filing. On that same day at approximately 11:00 PM I called 907-264-0609 expecting to get Lori Wade's answering machine, but she answered in person. I said I was surprised that I had not received a motion to accept late filing along with Mr. Gorski's *Opposition to the Supplemental Exhibits.* I said I believed that Mr. Gorski's April 3, 2007 *Opposition to Appellants Motion to Stay* [S-12359] *Pending Resolution of S-12050* had been accompanied by his *Motion to Accept* Late Filing. Lori Wade said I was mistaken and that on receiving the above April 3, 2007 *Opposition* Mr. Gorski had been contacted by telephone and advised to file a motion to accept late filing. Lori Wade said that she would call Mr. Gorski the next day, on Monday January 7, 2008, and advise him to file a motion to accept late filing.

9) On Tuesday January 8, 2008 I called Lori Wade's answering machine at approximately 8:45 AM. I said I believed the clerks had acted in good faith but that I believed mistakes had been made and asked her to call me at home. Shortly after she got to work Lori Wade returned my call. I first said that I did not wish to get into an antagonistic relationship with the clerks, but I did believe

that mistakes had been made, specifically that the court had, in essence, engaged in ex parte proceedings and advised the Denali Borough Attorney how to proceed without including me in the proceedings. She at first was defensive, saying that late filings had always been dealt with in that manner. I said her relationship with me had always been very professional, she had never offered me any advice, and that I valued that relationship. I stated that the law is fair because codes are high level conventions, or agreements, that provide straight-forward steps, and predictable rules, and that if the rules are not followed it all becomes chaos. I said I did not expect perfection from anyone, but expected honest people to admit their mistakes. Lori said that she had not yet called Mr. Gorski and that they would review the procedures regarding late filings.

10) On Friday January 11, after a failed attempt to talk to Lori Wade in person, I called my new Case Manager Tiffany Munoz. She said there was a policy that allowed clerks to deal with late filings in the manner described above, and that this was a "gray area". I stated I had not seen any such policy on the court website, and it such a policy existed I would like a copy of it. I said the law is fair because it provides straight-forward steps, and predictable rules, and that if the rules are not followed it all becomes chaos. At 4:00 PM Lori Wade answered a message I had left on her answering machine. She said no one had called Mr. Gorski informing him that his *Opposition* to my supplemental exhibits had been filed late, and that the *Opposition* had been sent upstairs to the

justice's chambers with a note that it was filed late.

11) On or about January 14, 2008 I called Lori Wade. I asked whether the justices would be involved in any review of procedures regarding late filings, and she assured me that they would be consulted. I voiced my concerns over other procedures used by the Alaska court system, including the treatment of evidence, but especially the denial of my motion for full court reconsideration of an order by an individual justice. She said the "full court" does not mean all five justices. I stated my belief that "the full court" meant all five justices. I noted that the rules required five copies of any motion for reconsideration by the full court, and that I had not been advised as to any deficiency in my motion for full court reconsideration of an order by an individual justice. She said that she would consult with Marilyn May on the above issues. On that same day Clerk of Court Marilyn May told me that the full court does not mean all five justices. She also informed me that a tie vote preserves the status quo, and a tie vote would therefore deny reconsideration. I noted that the continued exclusion of Justice Carpeneti would allow a minority of two justices to determine the course of proceedings.

12) On or about January 18, 2008 I called Administrative Assistant Sonja Ahern and Clerk Kimberly Kile in an attempt to positively identify Roberta in 4), 5) and 6) above. Ms. Kile said she would look into the matter.

13) On January 25, 2008 I reached Bobbi Jo Katchmar's answering machine in Judge Olsen's Chambers and asked her to call back with the last name of "Roberta", the clerk that preceded her on Judge Olsen's staff. At approximately 4:00PM that same day Ms. Katchmar returned my call and told my wife Susan that Roberta's last name was Miller and that she was "still trying to find the maps".

14) On January 28, 2008 I called Bobbi Jo Katchmar in Judge Olsen's chambers. She said she had taken Roberta Miller's job with Judge Olsen last May and that Roberta Miller was now Deputy Clerk. She said she had talked to Roberta and Kimberly Kile and she was still trying to find the Federal Census Block Maps. She described "chamber copies" of four unlabeled (as to exhibits) and unsubstantiated maps furnished by my former attorney Michael Walleri that were clearly not census block maps drawn by the U.S. Census Bureau. She said she would continue looking for the three U.S. Census Block Maps showing the Parks Highway corridor (004,011 and 018) that I had submitted to the clerks, as well as the entire roll of P.l. 94-171 County Block Maps for Denali Borough that had been accepted by Judge Olsen at Oral Argument. I told her that finding the maps was probably not an issue at this point, as an entire role of the U.S. Census Block Maps for the borough had been accepted by the Alaska Supreme Court.

Dated January _29_, 2008 /s/ David P Braun
David P Braun Pro Se

Sworn and subscribed this 29th day of January ___, 2008

/s/ Samantha Thompson

Notary Public For The State of Alaska

My commission expires on with office [Seal of the District Court of the State Of Alaska Fourth Judicial District]

APPENDIX V

From: Lori Wade
[lwade@appellate.courts.state.ak.us]
Sent: Saturday, December 06, 2008 4:27 PM
To: 'Dave Braun'
Subject: S-12050/S-12359
Attachments: AK001.PDF

Mr. Braun – here is the last page of your 1/29/08 affidavit in support of the Notice of Ex Parte Proceedings and Other Violations of Rules of Procedure Prejudicial to Appellant.

The last paragraph of this affidavit confirms what I know to be true. This court had possession of the US Census Block Maps for the borough. I distinctly remember them being in a large tube mailer. This tube of maps was hand carried by Marilyn May to the Fairbanks court in February of 2008 because you had mentioned to me that you may want to refer to them in your oral argument which was scheduled for 2/13/08.

In going through the files I did come across Marilyn's letter to you dated 2/23/08. I have allowed you to continue to have those calls with me and I need to enforce Marilyn's dictate.

I have nothing personal against you and see you as only trying to stand up because you feel you have been wronged and that you will continue to fight for

what you feel is right. I wish you the best of luck in that endeavor.

Respectfully,

Lori A. Wade
Chief Deputy Clerk
Appellate Courts
303 K Street
Anchorage AK 99501
(907) 264-0689 Phone
(907) 264-0878 Fax
lwade@appellate.courts.state.ak.us

APPENDIX W

In the Supreme Court of the State of Alaska

David P. Braun, Appellant,	)	Supreme Court No. **S-12050/S-12359**
v.	)	
Denali Borough, Appellee.	)	**Notice** Date of Notice: **11/25/08**

Trial Court Cases **# 4FA-04-02616CI**
4FA-02-02156CI

The $750.00 cost bond posted by Michael Walleri in case S-12050 is being returned to Michael Walleri with this Notice by check number 152543.

The $750.00 cost bond posted by David Braun in case S-12359 is being returned to David Braun with this Notice by check number 152544.

Although the cost of copying and binding appellant's briefs exceeded the amount paid toward that expense (see Order of 4/26/06), no further payment from appellant is required.

Clerk of the Appellate Courts

/s/ Marilyn May
Marilyn May

cc: Fiscal Operations

Distribution:

James M. Gorski
Hughes Pfeffner Gorski
Seedorf Odsen
3900 C Street, Suite 1001
Anchorage AK 99503

Michael Walleri
2518 Riverview Dr
Fairbanks AK 99701

David Braun
P O Box 222
Healy AK 99743

DATE November 25, 2008 — STATE OF ALASKA - ALASKA COURT SYSTEM — 152544

CASE NUMBER	RECEIPT NUMBER	DESCRIPTION	AMOUNT
S-12359	492766	Cost bond returned to posting party,	
		David Braun.	$750.00
		David Braun v. Denali Borough	TCMS

PLEASE DETACH STATEMENT BEFORE DEPOSITING - DO NOT CHANGE OR ALTER
WHEN DETACHED AND PAID THE CHECK BECOMES A RECEIPT IN FULL PAYMENT OF THE FOLLOWING ACCOUNT
NO OTHER RECEIPT NECESSARY

BANK: 89-6/1252
First National Bank of AK

STATE OF ALASKA
Alaska Court System

No. 152544

VOID AFTER 90 DAYS

Anchorage

DATE November 25, 2008

PAY ****Seven Hundred Fifty Dollars and 00/100**** $**750.00**

TO THE ORDER OF David Braun

ADDRESS PO Box 222
Healy AK 99743

ALASKA COURT SYSTEM'S
TRUST FUND ACCOUNT

Marilyn May

⑈152544⑈ ⑆125200060⑆ 0680 209 ⑈

APPENDIX X

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

DAVID P. BRAUN
Plaintiff,

vs.

DENALI BOROUGH,
Defendant.

Case No. 4FA-02-2156 Civil

OPPOSITION TO MOTION FOR STAY OF PROCEEDINGS

COMES NOW the Denali Borough, by and through its attorneys, Hughes Pfiffner Gorski Seedorf & Odsen, LLC, and files its opposition to Mr. Braun's motion filed on or about December 24, 2008.

Pursuant to Civil Rule 77, the Borough does not specifically respond to the motion for reconsideration, as such is not allowed unless requested by the court. The Borough does, however, feel obliged to note its opposition to motion for stay of proceedings. After six years of litigation, this matter is virtually in the home stretch. The Alaska Supreme Court has rendered its opinion and the only issue left for consideration by this court is an award of attorney's fees to Mr. Braun. The attorney's fees are to be determined in accordance with the catalyst theory as directed by the Alaska Supreme Court. Once again, Mr. Braun puts the cart before the horse in that he has, to date, (1)

failed to move for attorney's fees as required by this court and the Supreme Court and (2) doesn't know what the court is going to award him so he can determine whether the award is or is not satisfactory.

At this juncture, the Borough has not been served with any other pleading, but even if it were, such a pleading would not be dispositive of the last act required in this court. Mr. Braun should either file his motion for attorney's fees so that this case can be concluded, in its entirety, or the court can issue an order of dismissal should Mr. Braun fail to comply with the court's directive to move for attorney's fees.

Regardless of Mr. Braun's continuing beliefs with respect to litigation, this case is concluded but for the issue of attorney's fees. The Borough is entitled to bring this case to an end and should Mr. Braun choose to not exercise the right afforded him by January 16, 2009, the case should otherwise be dismissed with no attorney fee award due to Mr. Braun's failure to make such a request.

DATED at Anchorage, Alaska, this 30th day of December, 2008.

HUGHES PFIFFNER GORSKI
SEEDORF & ODSEN, LLC
Attorneys for Denali Borough

By: /s/ James M. Gorski
James M. Gorski
ABA No. 7710123